CENTRE FOR CRIMINOLOGY
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Charting Death Penalty Abolition Through Abolitionist *De Facto* States

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Abstract

This dissertation explores the phenomenon of abolitionist *de facto* (in practice) (ADF) states in the United States (US). These states, located primarily in the Midwestern and Western US, retain the death penalty *de jure* (in law) but have not carried out any executions in at least 10 years. Focusing on Kansas and Wyoming, this research challenges the assumption that ADF status inevitably leads to abolition *de jure*. Instead, it argues that ADF jurisdictions may remain vulnerable to the resumption of executions due to various political and social factors.

Using a theoretical framework informed by historical institutionalism and path dependence (i.e., an 'Analysis of Institutional Mechanisms and Structures' or 'AIMS'), this dissertation examines death sentences, state supreme court decisions, legislative efforts to repeal the death penalty, prosecutorial decisions, and current political and social attitudes toward the death penalty in Kansas and Wyoming to understand the causes and persistence of the ADF phenomenon in these states.

It is argued that the survival of the death penalty in Kansas and Wyoming is linked to antecedent historical conditions, particularly lynching and gun ownership, and that these conditions have furthered a 'cowboy culture' that endorses capital punishment as a means of maintaining order and justice. Race, class, and an 'othering' dynamic have also influenced who is deemed worthy of execution in these states, producing the critical junctures responsible for ADF in Kansas and Wyoming. Lastly, 'local legal cultures' explain how jurisdictions establish and maintain patterns of execution (or non-execution) and how particular events (i.e., 'near-misses') could have turned ADF into abolition.

This dissertation contributes to a broader understanding of the death penalty in the US by examining how historical, cultural, and legal/institutional forces stabilize ADF, complicating the path toward abolition. To date, it appears that no such study has been undertaken in the US.

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Introduction

In his final paper, the late criminologist Roger Hood called the *de facto* (in practice, but not in law) abolition (ADF) of capital punishment an 'enigma'. Hood (2021: 910) wondered what would convince ADF countries, or jurisdictions around the world that have not carried out an execution in at least 10 years (United Nations, 2020: 5), to finally repeal the death penalty. Although some scholars posit that ADF status is a great predictor of a state adopting *de jure* (by law) abolition (e.g., Ancel, 1968; Schabas, 2019), Hood (2021) was reluctant to share this optimism as he believed ADF status could reveal a country's lack of commitment to abolishing the death penalty in law, political discourse, and culture (see also Cullen, 2023).

What is more is that the term 'ADF' has competing definitions that have produced differing accounts of the total number of ADF jurisdictions worldwide (Amnesty International, 2023: 40; United Nations, 2020: 50-51). Prior to 1985, the United Nations defined a state as ADF if it had not carried out an execution in 30 or 40 years, but the organization eventually jettisoned this notably stringent standard in favour of the shorter (and arbitrary) '10-year rule' that is still used today (Hood, 2021: 912-913; Schabas, 2010: 29).[1] On the other hand, Amnesty International uses the United Nations' 10-year metric *in addition* to its own: a state must also evince no intention to execute, or have a settled policy against execution, to be considered 'abolitionist in practice' (Hood, 2014: 275).[2] Both of

[1] Professor Marc Ancel, a French jurist commissioned by the United Nations to report on the death penalty in Europe, preferred to use the term 'abolition by custom' to characterize states that had not conducted executions in 40 years, and his terminology was adopted by the authors of the United Nations quinquennial surveys beginning in 1975 (Hood, 2021: 912). The United Nations likely made the transition to the 10-year metric to increase the force of abolitionists' argument that there exists an international consensus toward abolition, as more states would be considered ADF under the 10-year rule.

[2] The United Nations (2020: 50-51) classifies 50 countries as 'abolitionist *de facto'* and Amnesty International (2023: 41) accepts 22 countries as 'abolitionist in practice', based on data from 2018 and 2022, respectively.

these classificatory standards present problems, however, since they have led many abolitionists (e.g., Ancel, 1968; Ogletree Jr. and Sarat, 2009; Schabas, 2010) to assume that states without recent executions are 'in the bag' when, in fact, these jurisdictions have not yet reformed their laws and committed to abolition *de jure* (Hood, 2014: 286). Consequently, some scholars have emphasized the retentionist aspect of ADF states, and challenged the teleological assumption that ADF states are, by definition, progressing toward abolition (e.g., Dudai, 2023; 2024; Hood, 2021).

Hood and Hoyle (2015) unambiguously define ADF countries as a subset of retentionist countries, or 'suspended retentionists,' since executions could resume, even after decades of disuse, in response to an uncertain political landscape or a heightened fear of egregious crimes.[3] Consider a few recent examples: Myanmar restarted executions in 2022 following a 34-year hiatus, exercising the death penalty against an activist and lawmaker who lost their appeals against terrorism convictions (Reuters, 2022), and in 2012, Gambian authorities executed nine individuals, ending an ADF period that had lasted since 1988 (United Nations, 2015: 9).[4] As of 2022, Gambia and Myanmar are the only *de facto* abolitionist countries to return to capital punishment in more than ten years (Schabas, 2019:

[3] In these rare cases, Schabas (2010: 31) argues that '[the reinstatement of the death penalty] often happens in a country that some demagogic politician tries to open the debate about the death penalty again or a newspaper editorialist says "maybe we should think about the death penalty again" or some religious leader calls for the death penalty and people think that this is all going to crumble now because public opinion will insist that we reinstate the death penalty.' For example, the Philippines abolished the death penalty in 1987, only to bring it back six years later, in 1993, following the National Assembly's outrage over 'lawlessness,' or increasing crime rates, in the country (Hood and Hoyle, 2015: 20). A total of seven executions (6 in 1999 and 1 in 2000) were conducted before the death penalty was abolished, once again, in June 2006 (2015: 100-101). Elsewhere, Fulgence Massawe, a human rights lawyer with experience handling death penalty cases in Tanzania, has argued that leaving executions 'as a matter of political will' means that they (1) can resume at any time and (2) will prompt judges to regard death sentences in the same way as life sentences (Cullen and Massawe, 2024).

[4] Gambian President Yahya Jammeh cited a rising crime rate as his reasoning for ordering the return to executions, though some responded to this by expressing concerns about the death penalty being used to remove political opponents (Adetunji, 2012).

227). However, at least 11 other countries resumed executions (after becoming ADF) before 2012 (Hood and Hoyle, 2015: 20),[5] and between 1965 and 1988, 13 ADF countries resumed executions (Hood, 2021: 913). Lastly, in the United States, a total of five states and the federal government have restarted executions following an interval of ADF (since 1976) (see Table 1), but this fact is often overlooked since the country is typically classified as retentionist overall (Amnesty International, 2023; United Nations, 2020).

Though a return to executions is relatively rare (Dudai, 2024: 146; Hood, 2014: 279; Hood and Hoyle, 2015: 20), the countries (and states) that have taken this step highlight the salience of Hood's (2021) apprehension about the implications of ADF, illustrating how *de jure* abolition is *not* always an inevitable consequence of a state becoming ADF (McCann and Johnson, 2009: 139-141).[6] Indeed, ADF jurisdictions may, in fact, resume executions, possibly in response to some dramatic 'triggering event' (McCann and Johnson, 2009: 141), absent complete abolition (i.e., a change in the law) (Hood and Hoyle, 2015: 20). Alternatively, they may enshrine the death penalty (whether intentionally or unintentionally) as a 'symbolic law', which affects other parts of the criminal justice system (Gottschalk, 2011; Dudai 2021) and jeopardizes the larger 'moral message' of abolition (Dudai, 2021: 1443-1444; Hood, 2021: 911). These concerns and

[5] In 2018, newly elected Gambian President Adama Barrow announced the suspension of the death penalty, having signed an international treaty (i.e., 'the Second Optional Protocol to the International Covenant on Civil and Political Rights') expressing the country's commitment to abolishing capital punishment a year earlier (Agence France-Presse, 2019; United Nations, 2020: 47). Barrow then commuted the sentences of the remaining 22 death row prisoners to life imprisonment in 2019 (Amnesty International, 2019; Jallow, 2019). However, despite these changes, five former members of the Gambian intelligence service were sentenced to death for the murder of a political opponent of ex-president Yahya Jammeh in 2022 (Rédaction Africanews, 2022; Ross, 2022), with one author noting that death sentences are rarely applied and usually commuted to life imprisonment (Darboe, 2022). Whether these death sentences will be carried out remains to be seen, but this recent trajectory shows that the journey towards abolition is not inevitably smooth.

[6] In the US, Bedau (2005: 24) observed that reversals from abolitionist to retentionist have occurred almost as often as sustained instances of abolition *de jure*.

more have prompted the present study, which will focus on understanding and defining ADF as it exists in the United States, specifically in the Midwestern and Western states of Kansas and Wyoming. As Hood (2021: 914) concluded in his final journal article, the 'cessation of executions … [can] not be taken automatically as a signal that a [state] [is] firmly allied to the abolitionist cause.' Thus, a study into the causes, meaning, and persistence of ADF is warranted and expected to shed light on the concept, especially as it is employed in two understudied jurisdictions with distinctive death penalty histories.

Table 1. **Significant ADF windows of retentionist states in the United States**[7]
Table created by author using data from the Death Penalty Information Center (2024a).
Note: Florida, Texas, Alabama, and Georgia have been consistently retentionist and are not listed.

Currently ADF			Currently Non-ADF	
California **1976-1991 (16)** First execution: 1992 Last execution: 2006 **2007-2023 (17)**	**Louisiana** 1976-1982 (7) First execution: 1983 Last execution: 2010 **2011-2023 (13)**	**Pennsylvania** First execution: 1995 **1976-1993 (18)** Last execution: 1999 **2000-2023 (24)**	**Arizona** **1976-1991 (16)** First execution: 1992 2001-2006 (6); 2015-2021 (7) Last execution: 2023	**Ohio** **1976-1998 (23)** First execution: 1999 Last execution: 2018
Idaho **1976-1993 (17)** First execution: 1994 **1995-2010 (16)** Last execution: 2012 **2013-2023 (11)**	**Montana** **1976-1994 (19)** First execution: 1995 Last execution: 2006 **2007-2023 (17)**	**South Carolina** 1976-1984 (9) First execution: 1985 Last execution: 2011 **2012-2023 (12)**	**Arkansas** **1976-1989 (14)** First execution: 1990 **2006-2016 (11)** Last execution: 2017	**Oklahoma** First execution: 1990 **1976-1989 (14)** Last execution: 2023
Indiana First execution: 1981 1986-1993 (8) Last execution: 2009 **2010-2023 (14)**	**Nevada** First execution: 1979 Last execution: 2006 **2007-2023 (17)**	**Utah** First execution: 1977 1978-1986 (9); **2000-2009 (10)** Last execution: 2010 **2011-2023 (13)**	**Mississippi** 1976-1982 (7) First execution: 1983 **1990-2001 (12)**; 2013-2020 (8) Last execution: 2022	**South Dakota** **1976-2006 (31)** First execution: 2007 Last execution: 2018
Kansas Last execution: N/A **1976-2023 (48)** **No executions.**	**North Carolina** 1976-1983 (8) First execution: 1984 Last execution: 2006 **2007-2023 (17)**	**Wyoming** **1976-1991 (16)** First execution: 1992 Last execution: 1992 **1993-2023 (31)**	**Missouri** **1976-1988 (13)** First execution: 1989 Last execution: 2023	**Tennessee** **1976-1999 (24)** First execution: 2000 2010-2017 (8) Last execution: 2020
Kentucky **1976-1996 (21)** First execution: 1997 2000-2007 (8) Last execution: 2008 **2009-2023 (15)**	**Oregon** First execution: 1996 **1976-1995 (20)** Last execution: 1997 **1998-2023 (26)**		**Nebraska** First execution: 1994 **1998-2017 (20)** Last execution: 2018	***Federal Govt.*** **1976-2000 (25)** First execution: 2001 **2004-2019 (16)** Last execution: 2021

[7] Following the reinstatement of their death penalty laws and initial executions, five states (and the Federal Government) went through a period of ADF before returning to executions once more after 1976: Arkansas, Idaho, Mississippi, Nebraska, and Utah.

A. Surveying ADF in America

As a collection of federated states, the United States (US) has consistently been labelled retentionist overall, which has led many scholars to overlook critical internal distinctions between individual states (Garland, 2017: 112; Steiker, 2005: 57; Steiker and Steiker, 2006: 1870).[8] Northern states like Michigan, Wisconsin, and Rhode Island have been abolitionist since the mid-nineteenth century, while others, like Texas and Oklahoma, routinely execute prisoners (Death Penalty Information Center, 2024a).[9] Between the date that the US Supreme Court lifted its informal moratorium on the death penalty in 1976[10] and the beginning of April 2024, there were 1,586 executions in the US, and the overwhelming majority of these executions, 81.6 percent (1,295), were carried out in the South, and specifically in Texas, which conducted 37.0 percent (587) of all executions (Death Penalty Information Center, 2024b).[11] Such disparity exemplifies how the death penalty is increasingly a 'southern phenomenon, driven by a handful of states' (Mandery, 2015; see also Baumgartner *et al.*, 2016: 10), and has led scholars to reflect on how the US

[8] Notable exceptions include the Cornell Center on the Death Penalty Worldwide (2020), which has criticized works that label the US as 'homogenously retentionist' since such assessments do 'not accurately reflect the legal status of the death penalty in the country as a whole.' Elsewhere, reports issued by the Secretary-General of the United Nations routinely outline the efforts of individual US states to abolish the death penalty (see, e.g., United Nations, 2015: 12, 15; 2020: 11). The first reports on the death penalty commissioned by the United Nations in 1962 and 1967 also included as separate jurisdictions the states of federal systems in Australia, the US, and Mexico (Hood, 2021: 911).

[9] The American death penalty is 'regionally patterned, with executions in states concentrated in the South and abolitionist states in the Northeast' (Garland, 2010: 192).

[10] *Gregg v. Georgia*, 428 U.S. 153 (1976). In 1972, the US Supreme Court (in effect) invalidated all death penalty statutes in the US. *Furman v. Georgia*, 408 U.S. 238 (1972). Although there was some hope at the time that this ruling would permanently abolish the death penalty, several states went back to their legislative drawing boards and enacted new statutes designed to pass the Court's scrutiny, which inaugurated the 'modern era' of capital punishment.

[11] By the end of 2023, Texas had put to death 586 inmates since 1976, and Oklahoma another 123 (Death Penalty Information Center, 2024c).

is 'in both the vanguard and the rearguard of worldwide death-penalty abolition' (Steiker and Steiker, 2015: 249).[12]

By contrast, capital punishment is rarely exercised but remains authorized by statute in nearly all Midwestern and Western states, namely: California, Idaho, Kansas, Montana, Nevada, Oregon, Utah, and Wyoming (Death Penalty Information Center, 2023a; see also U.S. Census Bureau, 2021). Except for California, which has the largest death row population in the Western Hemisphere (Nichols, 2016; see also California Department of Corrections and Rehabilitation, 2024), the majority of Midwestern and Western states have less than ten prisoners, if any, on death row (Fins, 2023: 1). These states have also sentenced very few, if any, prisoners to death in the modern era of capital punishment, though California has sentenced an average of eight people to death each year for the last 10 years (Death Penalty Information Center, 2022a).[13] Perhaps most critically, this collection of states shares a mean or average ADF length of 20 years, a potentially significant, but understudied, qualitative difference that separates them from the near total abolitionist North and the wholly retentionist South (see Figure 1).[14]

[12] Some scholars have suggested that examining ADF states is an unhelpful way to assess the death penalty in practice. Instead, they argue, the death penalty must be interpreted based on the actions, rationales, and histories of the (mostly southern) states that sentence hundreds to death and carry out scores of executions. For instance, the renowned death penalty scholar and defence attorney Stephen B. Bright (2005: 153) argued against using 'the experiences of states like Oregon, which seldom impose the death penalty and carry it out even less' to interpret the exercise of the modern US death penalty.

[13] Steiker and Steiker (2016: 1) note that, since executions are carried out with such rarity in California, they are the third, rather than the first or second, most common cause of death for prisoners on death row, behind natural causes and suicide.

[14] Garland (2010: 192) reflected on the regional disparity in abolitionist success when he wrote: 'Different states have had different policies at different times, ranging from the early and sustained abolitionism of Michigan, to the back-and-forth of repeal, reinstatement, and judicial invalidation of New York, to the sustained and enthusiastic retention of Texas.'

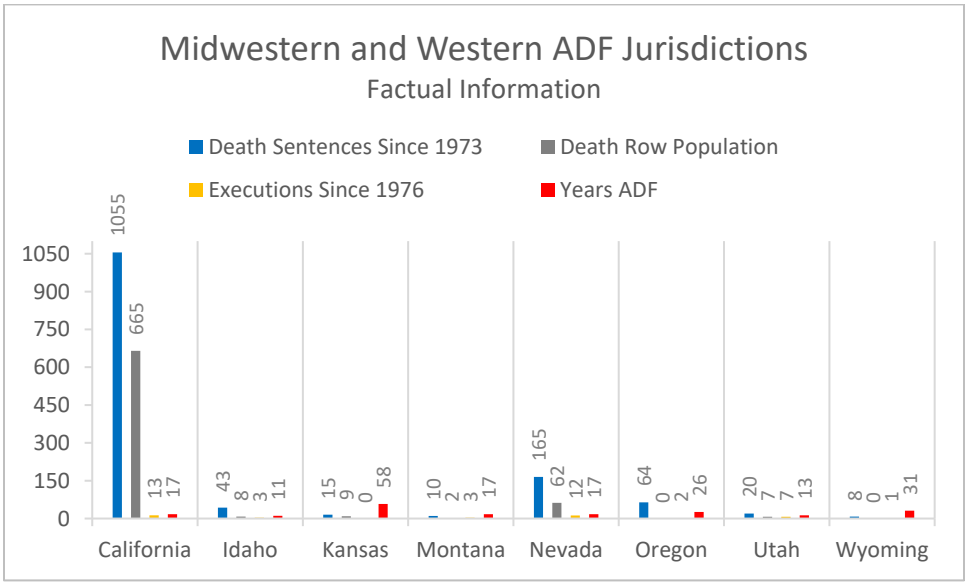


Figure 1. Chart depicting the total number of death sentences and executions since 1973 and 1976, respectively, the death row population, and the length of the most recent ADF period for Midwestern and Western ADF jurisdictions. Chart created by author using data imported from the Death Penalty Information Center (2022a).

Differences in death penalty systems across the US can be explained by many disparate factors across regions, including population size (i.e., there are more people to sentence to death, and there is a history of death sentencing) (Baumgartner and Gram, 2015, 63-64; Baumgartner *et al.*, 2020), cultural attitudes (Garland, 2010: 311), and prosecutorial discretion in seeking, and lawyerly ability in opposing, capital sentences (Bright, 2005; Kusisto, 2021).[15] Additionally, there are state-specific variations in legal processes, legislation, and policy about the death penalty, which are affected by (1) the design of capital statutes, (2) legislative support and opposition to the death penalty in state legislatures (Koseff, 2022), and (3) state supreme court rulings on capital punishment

[15] While counties with large populations and a greater rate of homicides are likely to have more death sentences than others, Baumgartner *et al.* (2020: 2) finds that death sentences in these places are 'attenuated by racial and self-reinforcing dynamics.' The political and geographic makeup of individual counties also greatly affects the outcomes of capital cases across the US (Donovan, 2022). Death sentences have become increasingly concentrated over the past 20 years, reflecting the impact of local political values on death sentencing (Baumgartner *et al.*, 2016). For example, in Ohio, juries in conservative strongholds such as Hamilton County issue more death sentences than juries in Franklin County, where the pool of Democratic voters has steadily increased (Welsh-Huggins, 2023).

(Garland, 2010; McCann and Johnson, 2009; Zimring, 2003). Yet, the question remains: why do states in the Midwestern and Western US retain the death penalty in law, but almost never use it?

To answer this overarching research question, the project ahead will provide a comprehensive analysis of the factors contributing to the retention of the death penalty in law, despite its infrequent application, in Kansas and Wyoming. While there has been little to no focus on the meaning of (or any explanation for) ADF in the US, there has been some (limited) focus elsewhere. Chapter Two will discuss how Dudai (2023), in a case study of Israel, attempted to negate the assumption of a simple dichotomy in explaining ADF using historical institutionalism and the concept of path dependence, which focus on the development and maintenance of long-term processes and historical legacies that shape policy decisions and institutional behaviours over time. Using a similar methodology, this study aims to fill the existing gap in the literature by providing a detailed analysis of ADF through historical, political, and legal lenses, and evaluating its implications for the full abolition of the death penalty in the US.

B. Research Questions

Scholars have provided several thoughtful and enlightening approaches to studying the death penalty and its regulation (Steiker and Steiker, 2016a) and retention in the US, with some referring to it as a 'peculiar' institution (e.g., Rieff, 2000), and at that a peculiarly *southern* institution (e.g., Anderson, 2003; Garland, 2010). However, despite all the attention concentrated on the exercise of the death penalty in the American South, ADF states constitute over half of all states that still retain capital punishment in the US (see Figure 2), especially in the Midwest and West, but the ADF phenomenon has not been

thoroughly assessed in these states and remains scarcely researched in the country (Steiker and Steiker, 2016a: 121), and the world, more generally (Dudai, 2023: 16).

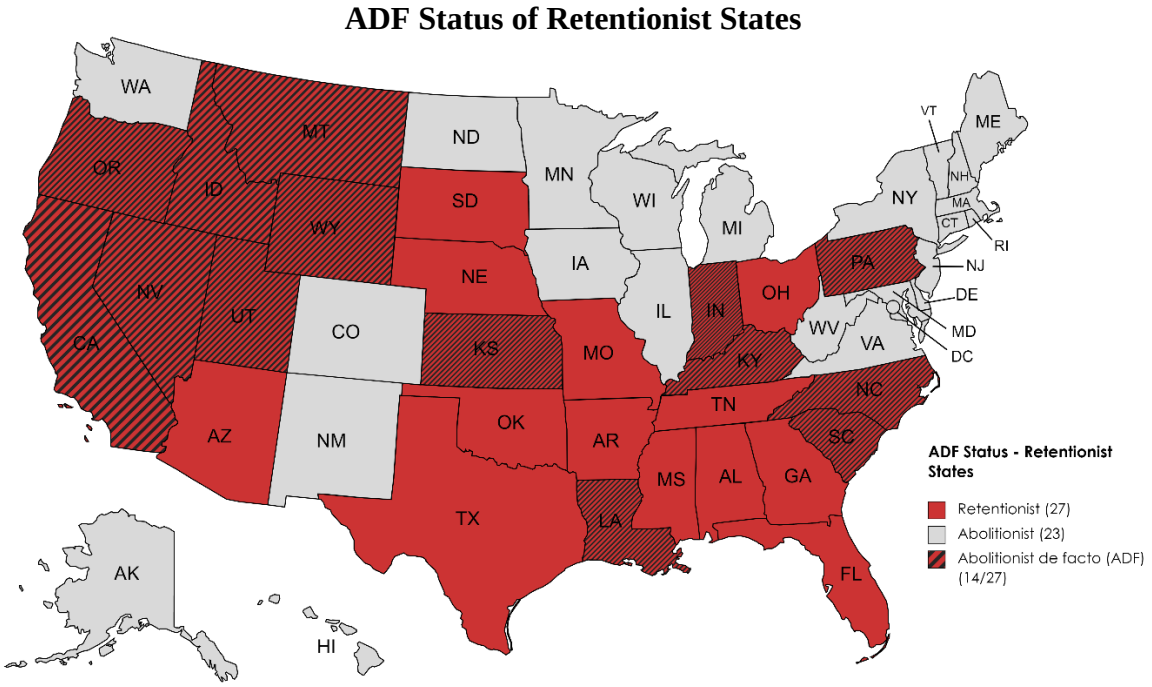


Figure 2. Currently, 14 of 27 retentionist states (coloured light red) are ADF (coloured dark red with stripes). The map was created by the author using statistics from the Death Penalty Information Center (2023a).

Apart from a section in Koch, Wark and Galliher (2012) dedicated to 'quasi-abolition' states in the US, ADF scholarship is relatively rare and tends to focus on jurisdictions outside the US. For instance, Johnson and Zimring (2009) probed the retention of the death penalty in Asia in their book, *The Next Frontier: National Development, Political Change, and the Death Penalty in Asia*, and Dudai (2023) scrutinized the stability of Israel's death penalty in a recent journal article (which will be discussed in Chapter Two of this project). Using several detailed case studies of capital punishment in countries such as Japan, South Korea, and Taiwan, Johnson and Zimring (2009) conducted cross-national comparisons of death penalty systems and concluded that politics, more than any other factor, separates low-execution nations from the very few states with high execution rates

in Asia, whereas Dudai (2023) identified government action as the critical difference between states retaining the death penalty as a matter of inertia, as compared to intention (see Johnson and Zimring, 2009: 314).

To bridge this gap in research about capital punishment, this dissertation will investigate why the practice of non-execution has persisted in a subset of ADF states: specifically, Kansas and Wyoming. Kansas is unique in that it has the longest ADF period of any state in the US, and Wyoming is considered the most politically conservative state in the country (Newport, 2017), a factor which has long been associated with the retention of the death penalty (Carroll, 2004; Hosie, 2023; see generally Jones, 2018). Hence, this project is framed by, and seeks to answer, several research questions addressing these states' retention of the death penalty:

1. What sociological, cultural, and legal reasons might there be for the persistence of the death penalty in law in Kansas and Wyoming?
2. Do contemporary 'users' of the death penalty (e.g., governors and prosecutors) benefit from its continued availability, and if so, how? What does this tell us about ADF as it exists in the American Midwest and West?
    a. How often do prosecutors seek (or consider seeking) the death penalty in Kansas and Wyoming, and what leads them to dismiss capital charges or end their pursuit of a death sentence?
3. To what extent is the concept of 'path dependence' and the 'historical-institutional approach' of scholars (namely, Ron Dudai) helpful in understanding ADF and its relationship to abolition in Kansas and Wyoming?
    a. What contingent events, if any, have stabilized the death penalty in these states, and are these events heterogeneous or connected in some way?

I am interested in determining what specific historical events (legal and political) have shaped the ADF status of Kansas and Wyoming. While these events might not have been planned by lawmakers (or any other political or judicial authority) ahead of time as part of any effort to retain (but not use) the death penalty (see Orren and Skowronek, 1994), I hypothesize that these events, despite their heterogeneity, have created larger, path-

dependent processes that have 'stabilized' capital punishment in the US. While this mirrors Dudai's (2023) hypothesis and approach in his case study on death penalty retention in Israel, I intend to extend the line of death penalty analysis by demonstrating how *these* events are unique to the death penalty system in the US, particularly considering the country's commitment to 'radical, local majority rule' (Garland, 2010: 96). I argue that such historical events have perpetuated ADF, which in turn has adversely affected state-level death penalty politics, particularly discourse about abolition and the likelihood that lawmakers in Kansas and Wyoming will repeal their death penalty statutes. Lastly, I aim to uncover what the death penalty symbolizes, if anything at all, in Kansas and Wyoming and whether that has changed over time (see Dudai 2023: 16), using a theoretical and empirical approach (described in Chapter Two). Having specified my research questions, I now turn to outline the project ahead, and the steps it will take to answer these questions.

C. Outline

At the start, Chapter One will provide a review of the literature, starting with David Garland's sociological approach to interpreting the cultural meaning and symbolic force behind the death penalty in the US. In the context of Garland's approach to thinking about the death penalty, this dissertation will problematize the concept of ADF, parsing out how the phenomenon might be a product of 'radical local democracy' (i.e., the delegation of most social and penal policy decisions to local political actors) (Garland, 2010: 309). I use Garland's thesis to help set the stage for Chapter Three, which will investigate the localized political and legal decisions made in the last few decades in Kansas and Wyoming. I suspect that these events have contributed uniquely to the rise of ADF and the entrenchment of capital punishment in these states, and Garland's work helps us to

understand how these events were able to occur. However, the first part of Chapter One will also consider criticisms of Garland's thesis, which one academic called 'a … one-dimensional account of major history-changing events' without 'analyses of resistance and specific power relations' (Ballinger *et al.*, 2012: 203-204). Thus, this dissertation will analyse ADF in dialectical terms and situate ADF states within the disparate, region-centric and politically charged landscape of death penalty retention in the US.

The second part of Chapter One will explore ADF through Carol and Jordan Steiker's (2016a) analysis of the US Supreme Court and its top-down judicial regulation of capital punishment under the US Constitution. Steiker and Steiker (2016a) argue that the US is an outlier among Western democracies because of its unusual and distinctive history of regulating state death penalty practices through federal constitutional law. Additionally, they propose a 'blueprint for abolition' to suggest how the future trajectory of the Court's death penalty rulings could promulgate the categorical constitutional abolition of capital punishment. Just as the Steikers' examination highlights 'the promise and pitfalls of [the Court's] constitutional regulation' (2016a: 5), this project aims to provide critical insight into how their theory, though comprehensive and critical in its assessment of the potential avenues available for death penalty abolition, overlooks the significance of ADF and how it may stall or prevent abolition on both the state and federal levels. Accordingly, the literature review presented in Chapter One will establish how little attention has been paid to understanding the proliferation of ADF, especially as a possible *consequence* of the Court's extensive regulation, because of the immense focus on (1) the possibility that national abolition might be obtained by judicial decree, as well as (2) the dismissive treatment of state-by-state legislative abolition (see Steiker and Steiker, 2016a: 255; Storey,

2018: 54). Steiker and Steiker's (2016a: 5) disposition as passionate observers using a scholarly lens will also inform the dialectical approach assumed by this project, bridging the gap between both the 'vices and virtues' of this author's experience and viewpoint on the death penalty and wider scholarly perspectives.[16]

Following the literature review presented in the first chapter, Chapter Two will introduce the historical-institutional approach recently utilized by Dudai (2023) in his case study of ADF in Israel, and offer a modified version suited for examining ADF in the US. Using this theory, which rejects teleology and ahistorical laws (Sewell, 2005), this project will survey the possibilities for understanding ADF as it exists in the US, particularly in Kansas and Wyoming, in Chapter Three. As this project will develop, the 'deeply contingent' nature of US death penalty practices has promulgated the 'entrenchment of a 'limbo' arrangement' (see Dudai, 2023: 11) across states rather than 'decisive constitutional abolition' (Steiker, 2012: 780; see also McGowen, 2011: 123-124).[17] The historical-institutional approach will provide the framework for this study to navigate the differences between stability and frictionless inertia (or 'inertial retention' and 'intentional retention') in death penalty retention and the various consequences these frames present for abolition, thus helping make sense of the meaning and consequences of ADF.

Next, Chapter Three will evaluate ADF and its relationship to contingency by way of two case studies. This chapter will describe the specific cultural, legal, and political

[16] Carol and Jordan Steiker both clerked for US Supreme Court Justice Thurgood Marshall in the late 1980s and inherited his disposition on the death penalty. As clerks, they prioritized indigent defendants' petitions for certiorari, informed by Marshall's experience as the only US Supreme Court Justice to have represented defendants in death penalty cases (Steiker and Steiker, 2016a: 5).

[17] Race-based abolition is but one of the three 'counterfactuals' that Steiker (2012) develops to demonstrate the contingency of the US death penalty. Steiker and Steiker (2012: 212) assert that the US Supreme Court's constitutional regulation of capital punishment has 'created the worst of all possible worlds–a system that [does] very little to cure the arbitrary and discriminatory administration of capital punishment but gave the reassuring appearance of doing much more.'

events that have arguably given rise to ADF in Kansas and Wyoming. It will identify 'critical junctures,' or the instances that set ADF into motion, such as Governor Joan Finney's 1994 decision to reinstate the death penalty, as well as 'near misses,' or episodes when 'a change of policy was plausible, considered, and rejected' (Dudai, 2023: 22; see also Capoccia & Kelemen, 2007), such as the Republican-led initiatives in the Kansas and Wyoming state legislatures to repeal the death penalty.

Overall, it is argued that Kansas and Wyoming's retention of the death penalty should be placed in a non-teleological narrative, to separate it from the 'civilization process' (McGowen, 2011) that many death penalty scholars (e.g., Hammel, 2011; Schabas, 2015; Ogletree Jr. and Sarat, 2009) assume will lead to worldwide death penalty abolition. Though only a few researchers have embraced the non-teleological approach (see, e.g., Dudai, 2023; McGowen, 2011), this will allow for (1) consideration of the unique circumstances that characterize ADF states and (2) greater understanding of the potential threat that a 'stabilized' death penalty poses to abolition.

D. Methods

To answer the questions presented in the outline above, this project analysed contemporary legal documents, legislation, and scholarship in constitutional law. First, I studied legal outcomes and decisions in trial and appellate courts (e.g., the Kansas Supreme Court) and the records of state legislatures (which include bills, amendments, floor speeches, committee hearings, and voting records) to understand discourse about the death penalty in Kansas and Wyoming. Understanding this discourse allowed for the interpretation of ADF, including its causes and proliferators, and the impact of contingent, heterogeneous events on death penalty retention in Kansas and Wyoming. Table 2 lists the

legislative events analysed and sets out the location, description ('activity'), and date of each hearing.

***Table 2*. Sources of data – Archived hearings in the Kansas and Wyoming state legislatures**
Table created by author using data from the Kansas and Wyoming state legislatures.

Kansas			
Bill	**Location**	**Activity**	**Date**
SB 375 (2010)	Senate floor	FAIL: 20-20 (tie vote)	2/19/2010
HB 2167 (2017)	House Committee on Corrections and Juvenile Justice	Hearing	2/13/2017
	House Committee on Corrections and Juvenile Justice	Died in committee	5/4/2018
HB 2282 (2019)	House Committee on Corrections and Juvenile Justice	Hearing	2/19/2019
	House Committee on Corrections and Juvenile Justice	Died in committee	5/21/2020
SB 136 (2021)	Senate Judiciary Committee	Died in committee	5/23/2022
HB 2300 (2021)	House Committee on Corrections and Juvenile Justice	Died in committee	5/23/2022
HB 2349 (2023)	House Committee on Corrections and Juvenile Justice	Introduced	2/8/2023
SB 211 (2023)	Senate Judiciary Committee	Introduced	2/9/2023
Wyoming			
Bill	**Location**	**Activity**	**Date**
HB 145 (2019)	House Labor Committee	PASS: 5-4	1/24/2019
	House floor	PASS: 36-21	2/1/2019
	Senate Judiciary Committee	PASS: 4-0 (unanimous)	2/13/2019
	Senate floor	FAIL: 18-12	2/14/2019
SB 150 (2021)	Senate Revenue Committee	PASS: 4-1	3/4/2021
	Senate floor	FAIL: 19-11	3/18/2021

Additionally, I conducted six interviews (remotely, via Microsoft Teams) to generate empirical data to help answer my research questions, with ethical approval from the central university ethics committee.[18] I recruited initial participants from the 'Board of Directors' and 'Contact' webpages of statewide organizations, such as the American Civil

[18] CUREC Research Ethics Reference: R91828/RE001.

Liberties Union (ACLU) of Kansas (see ACLU of Kansas, 2024) and the Office of the State Public Defender in Wyoming (see State of Wyoming, 2018), which maintain publicly accessible contact information for current and former volunteers and staff attorneys. Other interviewees were drawn from existing contacts, and some participants were recruited using snowball sampling.

These individuals were selected for the present study because of their status as (1) a legislative and/or legal elite from a statewide organization in Kansas or Wyoming or (2) a renowned death penalty expert from a national organization or institution of higher education. Interviewees were prompted to share information about their involvement with and/or expert knowledge of the death penalty in Kansas and Wyoming, and were asked questions such as:

1. What sociological and cultural reasons might there be for the retention of the death penalty in the Midwestern and Western US?
2. What contingent events, if any, have stabilized the death penalty in Kansas and Wyoming and are these events heterogeneous or connected in some way?
3. How often are concerns about ADF raised in Kansas and Wyoming?
4. How often do prosecutors seek (or consider seeking) the death penalty?
5. Has the design of capital statutes impeded or facilitated the exercise of the death penalty?
6. What socio-cultural reasons might exist for the retention, but non-use, of the death penalty in the Midwestern and Western US?

I also consulted (1) testimony regarding the death penalty from the Kansas and Wyoming State Legislatures, (2) newspaper articles, reports, and letters concerning government authorities, and (3) relevant case law via WestLaw to outline the trajectory of death penalty retention in Kansas and Wyoming, which helped to supplement (and verify) the data drawn from interviews. Additionally, I reviewed secondary sources and grey literature, including theoretical and empirical academic work in journal articles and books, to better understand the legal and political arguments that have animated abolition discourse on the national

level since 1976. These sources allowed me to situate the death penalty policies of Kansas and Wyoming within the larger narrative of death penalty retention in the US.

Lastly, as will be elaborated upon in Chapter Two, I employed a theoretical framework to guide my analysis of ADF (i.e., practices concerning death penalty abolition *and* retention) in Kansas and Wyoming. The historical-institutional approach was most recently utilized by Dudai (2023) in his study of the 'limbo' death penalty policies in Israel and the Occupied Territories, which have remained remarkably stable. To answer his research questions, Dudai (2023) reviewed parliamentary debates, (1) scrutinizing the discourse of parliamentarians and the outcomes of their decisions and (2) identifying how the symbolism of the death penalty has changed over time. I have taken a similar approach to understanding path-dependent institutional stability (and its perpetuation) by examining legislative debate, case law and statutes, and historical pamphlets and mass media reports.

This project now turns to Chapter One, which will provide a review of scholarly interpretations of the American 'culture' of capital punishment and the US Supreme Court's regulation of capital punishment, to contextualize the meaning and implications of ADF in the US.

Chapter One: Literature Review

No scholarly research has been undertaken to explore the concept of ADF in Kansas and Wyoming, or the US more generally, which is surprising given the sheer amount of research and literature on the American death penalty.[19] Where ADF is concerned, this author posits that the research which focuses on the retention and abolition of the death

[19] Koch, Wark, and Galliher (2012) dedicate a chapter of their book to exploring the legislative history of the death penalty in Kansas from 1975 to 1994, but they do not directly address why the state has been ADF for so long.

penalty in the US is most relevant, since ADF has historically been used to characterize jurisdictions where death sentences are not carried out according to established custom, and 'an experiment in abolition appears to be in progress' (Ancel, 1968: 10). Accordingly, the literature review ahead focuses on two key books: the first, by David Garland, advances a sociological explanation for the retention of capital punishment in the US, and the second, by Carol and Jordan Steiker, suggests a 'blueprint' for the nationwide abolition of the death penalty. These works were selected because, arguably, an analysis of ADF in the US requires an understanding of (1) the nature of death penalty discourse and the democratic majority will and (2) the difficulty and nuances of nationwide death penalty abolition under the US constitutional system. Situating the present study within the frame of these two themes will provide context for the causes and preservation of ADF in Kansas and Wyoming, which have different legal and political histories concerning the death penalty.

A. David Garland's 'Peculiar Institution'

In *Peculiar Institution: America's Death Penalty in An Age of Abolition*, David Garland attempts to account for the 'peculiar' and unusual death penalty system in the US. He frames the central question of his book as a sociological and historical problem: he considers, 'how to explain the peculiarities of America's twenty-first-century death penalty?' (Garland, 2010: 10). He also investigates the country's divergence from other Western nations in retaining the death penalty and challenges the commonly accepted theory of 'American exceptionalism' to explain the US commitment to maintaining such an inefficient system (Garland, 2010: 10-17; Frey, 2010).[20] The impact of race, states' rights,

[20] 'American exceptionalism' is an important but disputed theory in death penalty scholarship, meant to account for America's retention of the death penalty (Devienne, 2010; Garland, 2017; Steiker, 2005). The theory posits that America has an unusual commitment to death as an institution–premised on some fundamental difference, or uniqueness, in its history, culture, and people–that differentiates it from other

and 'the democratic will' take centre stage in his thesis, which scholars have argued sets it apart from approaches based on utilitarian or human rights rationales (Hoyle, 2012: 337). Garland also devotes a substantial amount of time toward outlining the legal history surrounding the death penalty, particularly the consequences of federal intervention from the US Supreme Court.

The most common critique of Garland's work centres on his decision to 'disengage' from the death penalty as an institution and privilege sociological analysis over normative judgement (see, e.g., Ballinger *et al.*, 2012: 203-204; Steiker, 2012: 369-370). Specifically, he resists providing any kind of ethical critique or moral assessment of capital punishment and focuses on analysing the complexities–and contradictions–of the American 'capital punishment complex' (2010: 14).[21] Thus, Garland's approach helpfully reminds this author to objectively approach and present the facts about the sociological and legal implications of ADF and what the concept may indicate for future efforts to retain or repeal the death penalty.

Overall, Garland's account of the contemporary American death penalty is compelling: he seeks to understand the death penalty as it is practiced in the American criminal justice system, but also its use and meanings in American society, which have changed over time (see also Steiker and Steiker, 2010a).[22] These objectives make his work

countries, especially those in Europe (Garland, 2010: 20-24). While Garland (2017: 108) acknowledges that the US is an empirical exception to abolition that places it at odds with Western historical development, and others recognize America's exceptionalist approach to international law (Storey, 2018), he argues that 'American tardiness in enacting complete national abolition is the real issue here, not a deeper-than-normal American commitment to the institution' (2017: 114).

[21] Garland (2010: 13) asserts that disengagement is a hallmark of the social science strategy to interpreting and understanding different phenomena, a position also taken by Cunningham (1973), who provided several defences of objectivity in social science research.

[22] The use and meanings of capital punishment have changed over time in the US. In a journal article that compliments Garland's research, Steiker and Steiker (2010a) argue that public discourse about the death penalty has been as discontinuous as it has been continuous over the course of American history. Specifically,

relevant to this project, and in particular, two of the points he makes in his book stand out as critical to the exploration of ADF: namely, that (1) death penalty *discourse* is what drives death penalty retention in the US (2010: 303-307) and (2) the US commitment to a radical form of federalism has simultaneously facilitated *and* stifled abolition (2010: 230; 311), as evidenced by the intervention of the US Supreme Court. This chapter now turns to explore these points in greater detail.

i. Death Penalty Discourse in America

Garland's project emphasizes how the death penalty is more closely tied to power dynamics and political considerations than to public safety and crime control (2010: 226; 286) or any formal philosophies of punishment (Hoyle, 2012: 335). He identifies death penalty discourse, or the 'pleasurable familiarity' (2010: 305) of moral argument, as the driving factor behind the retention of the death penalty in the US: '[w]e moderns may have lost the public ritual of execution, but we have substituted the ritual of the capital punishment debate' (2010: 305). Indeed, Garland points out how '[t]he *enactment* of death penalty statutes, the *bringing* of capital indictments, the *pronouncement* of death sentences, the *evocation* of death's imaginary' (2010: 305) allow for locals to imagine themselves sovereign and wield power over life and death, even as labyrinthian appellate procedures, or 'super due process,' have made death a remote possibility for most capital defendants.[23]

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they identify how capital punishment was once (1) viewed as a necessary response to extrajudicial lynchings and (2) defended as part of a larger program of eugenics, which many political leaders endorsed during the late nineteenth and early twentieth centuries (2010a: 645-646). As one can imagine, these arguments are very different from contemporary abolitionist rationales, which include debate about the cost of the death penalty (especially in comparison to life without parole), and the death row phenomenon (Steiker and Steiker, 2010a: 646; see also, Adeleye, 2021; Steiker and Steiker, 2010b).

[23] Garland (2010: 262) defines 'super due process' as '[the] regime of enhanced procedural protections and safeguards' instituted by the US Supreme Court in the modern death penalty era. Super due process makes it more difficult for states to secure death sentences and has prompted judicial decisions from the US Supreme Court that, for example, allow capital juries to consider any mitigating factor presented by the defence. *Lockett v. Ohio*, 438 U.S. 586 (1978). While super due process is intended to protect defendants from the kind

He posits that the public is drawn to discourse about death because it confers moral power, is emotionally appealing, and claims to provide justice (2010: 301-307). In the modern death penalty era, our willingness to impose the death penalty, Garland argues, is evidence of our desire to 'play God' (2010: 305), a macabre wish buttressed by a capital system designed 'to maximize public enjoyment of death penalty discourse while minimizing public exposure to actual state killing' (2010: 307). He asserts that discourse about death has replaced any practical usefulness that the death penalty might have for fulfilling actual penal objectives, namely, deterrent crime control and retributive justice (2010: 286-289).

According to Garland, the American death penalty has never been so maladapted 'to the stated purposes of criminal justice' (2010: 13) than when criminal justice professionals, politicians and elected officials, the mass media, and the public take advantage of the possibilities it presents as a transgressive outlet, source of professional mobility, and provider of psychic reward (2010: 288-289; 311).[24] Yet, as one author has asserted, this assessment might be better suited to the death penalty of the 1980s and 1990s, when

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of arbitrary executions that prompted the nationwide moratorium in 1972, it has promulgated an ever-extensive legal process that has rendered the death penalty less effective, making '[t]he U.S. death penalty … an attenuated system of delays, deferrals, and inordinate expense' (Frey, 2010) that has prompted many judges to speak out. As one justice once remarked, 'Since 1976, hundreds of juries have sentenced hundreds of persons to death, presumably in the belief that the death penalty in those circumstances is warranted. … [Yet,] virtually nothing happens except endlessly drawn out legal proceedings.' *Coleman v. Balkcom*, 451 U.S. 949, 956; 958 (1981). Elsewhere, reflecting on the dysfunctional administration of capital punishment, a federal district court judge noted that, 'For all practical purposes then, a sentence of death in California is a sentence of *life imprisonment with the remote possibility of death*—a sentence no rational legislature or jury could ever impose.' *Jones v. Chappell*, 31 F. Supp. 3d 1050, 1053 (2014).

[24] In the modern death penalty era, death has been 'put into discourse' (Garland, 2010: 312) to serve political and culture purposes, particularly by Republican presidential candidates. Consider these three examples: George W. Bush presided over forty executions, the largest number of state executions ever carried out in a single twelve-month period, during his 2000 presidential campaign (Garland, 2010: 292); President Donald Trump, who will run for re-election in 2024 (Gambino and Pengelly, 2022), authorized 13 federal executions before leaving office (Tarm, 2023), which ended an ADF period of 17 years; and Florida Governor Ron DeSantis scheduled six executions as part of his 'tough on crime' campaign for the 2024 Republican presidential nomination, reflecting a larger history of 'presidential posturing' that evidences the arbitrary application of the death penalty (Pilkington, 2023).

executions reached their peak, because it does not accord with the decline in support for capital punishment witnessed over the last few decades (Steiker, 2012: 371; see also Oliphant, 2016). As such, Garland's analysis leaves readers lacking a deeper understanding of the *current* American investment in capital punishment, which has become increasingly isolated to particular states, and specific counties within those states (Baumgartner *et al.*, 2016; 2020), even though he identifies local democracy as a driving factor behind retention (2010: 309-310). This gap in the literature necessitates study on a much more granular level, and with greater attention to the *contemporary* rationales that undergird retention, especially in states that use the death penalty infrequently.

Lastly, the hunger for death penalty discourse that Garland identifies aligns with his hypothesis that some American states retain capital punishment for the power it lends to their local values and sovereignty, especially in the face of inequality and hostility between groups, limited solidarity, and fears about crime and violence (2010: 190-192; 246). Yet, despite his emphasis on the diversity of state interests, group relations, cultural values, and violence control (2010: 310), Garland fixates his analysis on the legacy of slavery (the original 'peculiar institution') and its long-lasting effects on capital punishment in the American South (2010: 190-191; 310), a common approach taken by death penalty scholars (Rigby and Seguin, 2021). Garland describes how 'federalism on racial issues' (Steiker, 2012: 363) allowed local jurisdictions to enforce practices premised on racial exclusion and subordination, such as lynching and segregation, which in turn preserved support for the death penalty (2010: 190). Certainly, it would be unwise for any author to ignore or underestimate the impact that slavery has had on capital punishment. However, as Chapter Three aims to demonstrate, the institution (and its legal and extrajudicial progeny) provides

a limited explanation of death penalty retention in states (i.e., frontier states) whose histories are not as directly intertwined with the legacy of antebellum racial slavery (see Pfeifer, 2013).

Indeed, Garland's attentiveness to slavery (2010: 207-217) and the American South–while home to the most avid users of the death penalty, past and present–comes at the expense of any deeper analysis of the histories, institutions, and cultural conditions that might better account for the persistence of capital punishment elsewhere in the US. He makes a brief mention of 'state formation processes,' which promulgated widespread gun ownership and regional cultures of violence (2010: 188-189), but he ultimately misses the opportunity to articulate a more nuanced understanding of the social function and meaning of the death penalty in places like Kansas and Wyoming, where 'the specter of lynching' (2010: 311) and racial conflict likely have less explanatory power. As Chapter Three aims to demonstrate, his thesis could be further developed by examining 'western' collective violence and culture, especially that which defined the American project from the late eighteenth through the early twentieth centuries (see Pfeifer, 2013). For example, scholars elsewhere have argued that there exists a 'frontier theory of lynching' (Berg, 2011: 45-50) that is distinct from the 'lynching hybrid … [of] rustic self-governance … [and] caste oppression' (Dray, 2003: 18) endemic to the American South (see also Pfeifer, 2013). Thus, it is possible that the history of lynching in these states reflects a more complicated narrative than that which can be explained by racial terror alone (see Gabbatt, 2024). With these limitations in mind, the case studies presented in Chapter Three will examine how such practices and their historical contexts might inform our understanding of the

contemporary events and contingencies that have contributed to the persistence of ADF in the former frontier states of Kansas and Wyoming.

ii. Obstacles to Abolition

Garland (2010: 280) argues that the US political structure and its legal establishments have uniquely facilitated the retention of the death penalty, primarily along two axes. As previously discussed, he zeroes in on (1) the local politics, group relations, and legal arrangements that shape capital punishment at the micro-level (i.e., the state and county level) in the US (2010: 192), but he also devotes a substantial amount of time toward parsing out how (2) the US Supreme Court has driven the evolution of the American death penalty, primarily since the 1960s. Garland succeeds in bringing us to 'the precarious present moment' (Steiker, 2012: 372) and 'resists highly deterministic accounts that suggest the present could not have been otherwise' (Steiker, 2012: 357). He accomplishes this largely by tracing the history of the US Supreme Court's capital punishment jurisprudence and identifying instances where abolition, rather than regulation, *could* have become the policy of the US Supreme Court, which presents a much different picture for the trajectory of capital punishment in the US. Key to the study at hand is how Garland identifies and describes the impact of *Furman v. Georgia* (1972) and *Gregg v. Georgia* (1976), two decisions about capital punishment on the national level that arguably set contemporary iterations of ADF in the US into motion.

As explained by Garland, the US Supreme Court is 'an important mechanism for countermajoritarian law-making' (2010: 185), and he compares the institution and its capabilities to the top-down processes that brought about abolition in Europe (2010: 310), drawing on scholarship from others that explores the European approach (e.g., Hood and

Hoyle, 2015; Zimring, 2003). Championed by liberal and governing elites who emphasized informed judgement and adherence to contemporary human rights standards, Garland recounts how abolition efforts in Europe consistently prevailed in the face of majority public opinion that sought to retain the death penalty, especially as membership of the European Union became contingent on abolition (Garland, 2010: 130-131; see also Demleitner, 2002; Hood, 2018). In Europe and elsewhere, scholars have shown that when government officials wield their political power and capitalize on support from judicial bodies (i.e., 'lead from the front') (Zimring and Hawkins, 1986: 22) to bring about permanent changes in death penalty policy, the public will follow their lead, and inevitably embrace abolition (Sato and Bacon, 2015).[25] But in America, as Garland artfully portrays, the (1) responsiveness of political institutions to the public will has frustrated prospects for abolition (2010: 310), and (2) the structure of the American polity prevents the imposition of a national policy of abolition (2010: 45).

According to Garland (2010: 256), no clearer was the role of the US Supreme Court as the potential arbiter of death penalty abolition than in the 1960s, when social forces became focused on rationalizing state power, enshrining civil rights, and advocating for liberal democracy in the US. Lawyers from the Legal Defense Fund (LDF), led by Professor Anthony Amsterdam, mounted litigation in the federal court system as part of a 'moratorium strategy' intended to create a 'death-row logjam' that would make it difficult for courts and governors to resume executions (Meltsner, 1973; see also Tauber, 1998).[26]

[25] In East and Southeast Asia, scholars have concluded that public opinion does not majorly influence rates of executions, but rather, that executions increase when authoritarian governments desire them, and decline when political regimes become 'more democratic or less eager to kill' (Zimring and Johnson 2012: 191-92).
[26] The LDF attorneys' challenge to the death penalty was motivated in part by a subtle cue from the US Supreme Court. Specifically, a dissent from Justice Arthur Goldberg in 1963 urged the Court to consider whether the Eighth and Fourteenth Amendments to the US Constitution permitted death sentencing for

These attorneys excelled at obtaining stays of execution for their capital clients, and the litigation efforts of the LDF ultimately culminated in the 1972 case of *Furman v. Georgia*, whereupon the US Supreme Court constitutionally invalidated the death penalty. This ruling held that, because states were applying death sentences in an arbitrary and capricious manner, where receiving a death sentence was akin to being 'struck by lightning[,]' capital punishment was unconstitutional (as applied) under the Eighth Amendment prohibition against cruel and unusual punishment.[27] As Garland illustrates, *Furman* blocked all executions for five years, and many believed the decision was 'a decisive act of abolition ending American capital punishment once and for all' (2010: 229; see also McGowen, 2011: 120).

The abolitionist victory, however, was short lived. Garland succeeds in explaining why: the US Supreme Court's intervention into capital punishment motivated a pivotal conservative and cultural 'backlash' that ushered in the return of the death penalty less than five years later, when the Court decided *Gregg v. Georgia* (1976). Following *Furman*, thirty-five states enacted revised death penalty statutes amid rampant fear of crime, racial hostility, and a 'growing gap between liberal elite sentiment and mass popular opinion' (2010: 246), and many state officials began to assume a deep animosity toward the Court and what they viewed as the 'judicial usurpation' (2010: 248) of an issue that they believed was theirs to decide.[28] Effectively, the death penalty became 'a litmus test in the politics of

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individuals convicted of rape. *Rudolph v. Alabama*, 375 U.S. 889 (1963) (Goldberg, J., dissenting from the denial of certiorari). Though Goldberg did not explicitly mention race in his dissent, his law clerk, Alan Dershowitz, had prepared an extensive memorandum on the issue that ultimately persuaded Goldberg to retain a footnote to a United Nations report on capital punishment that presented data on racial discrimination (Steiker and Steiker, 2016a: 80-81). Goldberg and Dershowitz 'hoped that this oblique reference would be enough to suggest the race argument' (Mandery, 2013: 29).

[27] *Furman v. Georgia*, 408 U.S. 238, 309 (1972).

[28] After *Furman* was decided, state officials including Ken Brown, a member of the California Correctional Officers Association, called for a national drive to amend the US Constitution to counter the US Supreme

crime control, [and] a powerful symbol of states' rights' (Garland, 2010: 185). As scholars elsewhere note, the conservative backlash was not spontaneous, but rather, 'the flames of resistance were fanned by political actors who found in Furman's flaws a campaign gift' (Steiker and Steiker, 2016a: 221-2). Garland (2010: 253-254) argues that this is when the death penalty 'ceased to be a matter of penal policy and became instead a symbolic battlefield' (2010: 253), marking the shift from the 1960s progressive penal policies centred on rehabilitation to the 1970s 'law and order' politics that emphasized retribution and incapacitation (2010: 248-255; Steiker, 2012). Consequently, in *Gregg*, the Court 'inaugurated a whole new capital punishment complex … with a distinctive set of legal rules, institutional forms, and cultural figures' (Garland, 2010: 261).

Though it is unclear whether *Furman* expedited the return of popular support for the death penalty, or brought it about entirely (Lain, 2007: 73), Garland (2010) makes clear how the US Supreme Court's intervention was a contingent event, and how, unlike elite-led countermajoritarian reform in Europe (see also Hoyle, 2011b: 235), abolition via this pathway in the US was not only (1) unfeasible (if in large part due to constraints on the Court posed by the US Constitution), but ultimately (2) provoked fervent outrage and opposition from politicians, whose voices easily translated pro-death majority sentiment into policy (2010: 166).[29]

For the study ahead, it is argued that the Court's intervention marks the beginning of a historical sequence that has motivated the proliferation of ADF, especially in states where the 'type' of retention (i.e., intentional or inertial) is unclear, and where the death

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Court's ruling, and Jere Beasley, the lieutenant governor of Alabama, lambasted the Court: 'A majority of this nation's highest court has lost contact with the real world' (Meltsner, 1973: 290).

[29] The US Constitution not only constrains jurists from *imposing* capital punishment, but it also limits the possibilities under which it may be held unconstitutional (Garland, 2010: 186-187).

penalty might have otherwise been permanently abolished had the Court decided *Furman* and *Gregg* differently, or not at all. Moreover, if Garland's 'cultural backlash' rational for the retention of the death penalty best speaks to the death penalty of the 1980s and 1990s, as another scholar has suggested (Steiker, 2012), then it might be the case that the survival and subtle retention of capital punishment today might be better explained by specific cultural and legal practices (as outlined in the first section), and the view that death penalty abolition is an assault on states' rights, especially when carried out by countermajoritarian elites (as this section has sought to illustrate). Having focused on David Garland's reasons for the persistence of capital punishment in the US, this chapter now shifts to examine Carol and Jordan Steiker's study of the US Supreme Court in their 2016 book, *Courting Death: The Supreme Court and Capital Punishment*. Drawing on the Steikers' study, it is argued that the focus on the Court's jurisprudence has distracted from consideration of ADF as an important factor in nationwide abolition.

B. 'Courting Death' with Carol and Jordan Steiker

Aside from a few historical studies of death penalty abolition,[30] abolition scholarship has primarily coalesced around the Eighth Amendment jurisprudence of the US Supreme Court (see, e.g., Barry, 2017a; 2017b; Bessler, 2011; Entzeroth, 2012; Steiker and Steiker, 2020). Many scholars maintain that national abolition will be obtained via judicial decree (e.g., Barry, 2017b; Bedau, 2004; Berry III, 2020a; Bessler, 2014: 109; Kalmanson, 2020), most notably Steiker and Steiker (2008; 2009; 2012; 2016a; 2016b; 2020). These academics have consistently advocated for the categorical constitutional abolition of the

[30] For examples of historical studies of death penalty abolition, see Radelet (2017) in Colorado, Wanger (1996) in Michigan, and Warden (2012) in Illinois.

death penalty, even as the prospects for judicial abolition have changed significantly over the past decade.

Two works in the Steikers' academic portfolio bear special relevance to the present study on ADF. In 2016, the Steiker siblings presented a doctrinal 'blueprint' for abolition under the Eighth Amendment in their book, *Courting Death: The Supreme Court and Capital Punishment*. More recently, however, they have conceded that the US Supreme Court's marked hostility toward the constitutional regulation of the death penalty has substantially decreased the odds of abolition (Steiker and Steiker, 2023). Nonetheless, these scholars maintain that abolition is not a question of *if* (or *how*), but *when* (2023: 63; see also Steiker and Steiker, 2012: 212). They assert that changes in the Court's membership, combined with the continued decline of public support for capital punishment and the Court's history of regulating the death penalty, will prompt a reassessment of the death penalty's constitutionality (2023: 1-2), or a '*Furman* II' (2016a: 289).[31] Until then, they argue that the US has entered (and will remain in) a period of 'abolition in waiting' (2023: 15).

Through the lens of the Steikers' academic work, the second half of this literature review seeks to expound upon how their scholarly focus on the Court's jurisprudence has complicated, and distracted from, judicial and legislative abolition at the state level, obfuscating the role that ADF may play in abolition *and* its potential explanatory power for death penalty retention. As the first section of this literature review will explore, the Steikers argue that the US Supreme Court's interpretation of the proportionality principle is

[31] The Steikers' position reflects Malkani's (2016: 107) observation that 'the over-arching strategy of the anti-death penalty movement is geared towards securing a ruling from the US Supreme Court that the death penalty is contrary to the Eighth and Fourteenth Amendments to the Constitution.'

the most viable path to nationwide abolition (2016a: 271; 278; 282). However, as the second section will clarify, the Steikers' argument does not properly consider the nature of ADF states, and this issue is compounded by the fact that the Court's receptiveness to the Steikers' blueprint has changed, which the authors acknowledge in their more recent work. For these reasons, the third section concludes with this author arguing that possibilities for abolition must be considered outside the US Supreme Court, and that the intervention of the US Supreme Court has helped sustain ADF on a state-by-state basis.

i. The Steikers' Blueprint for Abolition

In *Courting Death*, Steiker and Steiker (2016a: 271-285) outline the lineage of capital cases decided by the US Supreme Court under the Eighth Amendment and explain that the Court has promulgated 'many, overlapping, contested, [and] ambiguous' doctrines to regulate states' death penalty practices. These doctrines, which they describe in detail, are: (1) narrowing (requires states to enumerate specific, well-defined aggravating factors); (2) proportionality (reduces the scope and use of capital punishment by limiting the offenses and offenders that states can put to death); (3) individualized sentencing (mandates that states grant jurors the option to reject the death penalty based on mitigating evidence); and (4) heightened reliability (necessitates the provision of additional safeguards for defendants in capital cases to protect them from manifestly unfair state rules or practices) (2016a: 158). The Steikers insist that doctrines other than proportionality, however, have largely proven 'intricate and nonsensical' (2016: 162), 'broad' (2016: 167), and 'amorphous' (2016: 168). Consequently, Steiker and Steiker (2016a: 272) base their 'blueprint for abolition' on the proportionality doctrine, which they assert provides the foundation for the most substantial constitutional challenge to capital punishment.

Academics have heralded this approach as 'thoughtful and sound' (Denno, 2017: 1876) and 'a cogent constitutional route' (Yorke, 2017: 469) for death penalty abolition.

Although the Court largely refused to promulgate proportionality limits until the early 2000s,[32] Steiker and Steiker point out that the Court's more contemporary decisions based on proportionality have restricted the number of crimes triggering death eligibility, such as the non-homicide offense of child rape,[33] while others have excluded certain classes of offenders from receiving the death penalty, namely, juveniles (i.e., individuals under 18)[34] and those with an intellectual disability (2016: 163-165).[35] However, the authors recognize that proportionality limits have only ever been applied to the most marginal of capital practices, and thus, have had a minimal impact on the rationalization of the American death penalty overall (2016: 164). Consequently, they suggest three ways that the Court could extend its proportionality doctrine: (1) by excluding (additional) types of offenders who are categorically less culpable than the average criminal, such as those with severe mental illness, (2) by acting more diligently in terms of enforcing its ban on executing persons with intellectual disability,[36] and (3) by requiring states to engage in their own comparative proportionality review, an obligation the Court refused to impose upon the states in 1984 (2016a: 178).[37] They contend that these results 'represent important

[32] In 1989, the Court explicitly refused to exempt juveniles and persons with intellectual disability from the death penalty, on the basis that there was 'no 'national consensus' forbidding the execution of such offenders' (Steiker and Steiker, 2016a: 163; see also Moriearty, 2017). This has led at least one scholar to conclude that the Court's death penalty proportionality decisions are 'poor indicators of what the Court will do in the future' (Stinneford, 1741: 2008).
[33] *Kennedy v. Louisiana*, 554 U.S. 407 (2008).
[34] *Roper v. Simmons*, 543 U.S. 551 (2005).
[35] *Atkins v. Virginia*, 536 U.S. 304 (2002).
[36] In *Atkins v. Virginia*, the Court barred states from executing those who are mentally disabled but left it up to states to define who has an intellectual disability. *Id.* at 317.
[37] The proportionality analysis discussed herein is distinctive from 'comparative proportionality review' (i.e., appellate judges' comparison of an individual defendant's sentence with sentences imposed in similar capital cases) (see Berry III, 2011: 63-64). While some states permit this kind of review (Steiker and Steiker, 2016a:

regulatory constraints' (2016: 164), but simultaneously argue that they are less important than the Court's evolving methodology about proportionality review.[38]

Steiker and Steiker (2016: 276) assert that the Court's earliest proportionality limit, promulgated in *Coker v. Georgia*,[39] suggests that that the death penalty, were it to fail to promote either a deterrent *or* retributive purpose, could be completely invalidated under the Eighth Amendment. Based on more recent interpretations of proportionality, they also argue that the 'capaciousness' of the principle allows for the inclusion of challenges to the death penalty that might otherwise have little success on their own, such as the risk of executing the innocent (2016a: 272-273) [40] and racial discrimination and arbitrariness (2016a: 273-275).[41] In their view, this highlights the salience of the Court's proportionality

178), the Eighth Amendment does not require it. *Pulley v. Harris*, 465 U.S. 37 (1984). At least one state supreme court has absolved itself of affording defendants such protection: in 2020, the Supreme Court of Florida held that the state constitution legally prohibited the judiciary from reviewing death sentences for comparative proportionality absent authorization by statute, receding from a 50-year-old precedent (Johnson, 2020). For Justice Jorge Labarga's concerns about the decision to strike proportionality review from the Court's mandatory review in death penalty appeals, see *Lawrence v. State*, 308 So.3d 544, 552 (2020) (Labarga, J., dissenting) (arguing that 'the majority takes the most consequential step yet in dismantling the reasonable safeguards contained within Florida's death penalty jurisprudence').

[38] Decisions made under heightened reliability, for example, include the Court's holding that defendants must have the ability to access a presentence report, and its conclusion that defendants charged with an interracial offence are entitled to specific *voir dire* practices, specifically to mitigate the potential of racial bias. *Gardner v. Florida*, 430 U.S. 349, 357-362 (1977); *Turner v. Murray*, 476 U.S. 28, 37 (1986).

[39] 433 U.S. 584 (1977).

[40] Innocence and race have been major themes in the opinions of the justices who have questioned the constitutionality of the death penalty (see, e.g., *McCleskey v. Kemp*, 481 U.S. 279, 320 (1987) (Brennan, J., dissenting); *Baze v. Rees*, 553 U.S. 35 (2008) (Stevens, J., concurring); *Glossip v. Gross*, 576 U.S. 863, 908 (2015) (Breyer, J., dissenting)).

[41] Steiker and Steiker (2016a: 176; 274) point out that challenges based on proving arbitrariness and racial discrimination would rely heavily on empirical evidence, which is (1) expensive and time-consuming to produce and (2) frequently limited in terms of temporal and geographic scope, which precludes one from drawing the broader inferences necessary to support an argument for nationwide abolition (see also Lucas, 2017: 285). For example, in *McCleskey v. Kemp*, the US Supreme Court famously concluded that, while racial discrimination had played a statistically significant roles in the distribution of death sentences in Georgia, McCleskey had not proven that such purposeful discrimination had undermined the constitutional validity of *his* death sentence. 481 U.S. 279 (1987). The Court refused to respond as to whether 'McCleskey's wide-ranging arguments … [succeeded in] challeng[ing] the validity of capital punishment in our multiracial society[.]' *Id.* at 320.

doctrine as a means to abolition (2016a: 275).[42] At the same time, the authors also believe that proportionality provides a way for the Court to abolish the death penalty in a manner that is supported by decades of precedent, thereby insulating the institution from charges that it is 'activist' or 'political' (2016a: 285). This project now turns to describe proportionality review, a two-part process with specific criteria (2016: 321).

A Two-Part Methodology

Steiker and Steiker (2016a: 163-164) explain that *Coker* barred the application of the death penalty in cases of rape[43] using a two-part methodology premised on the Court's previous holding in *Gregg v. Georgia*. In *Gregg*, the Court found that the Eighth Amendment is not 'a static concept … [and] an assessment of contemporary values … is relevant to [its] … application[.]'[44] Originally formulated in the 1958 case of *Trop v. Dulles*, the 'evolving standards of decency' test is derived from the Court's efforts to capture the imprecise and variable scope of the words of the Eighth Amendment, which Chief Justice Earl Warren famously argued 'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.'[45] Since *Trop*, the Court has relied on this standard to determine whether a punishment is cruel and unusual,[46] and it is used to guide the two-step process of proportionality review (Lucas, 2017; Stinneford,

[42] The expansiveness of the proportionality doctrine is also evident when one considers how Eighth Amendment law has been applied in the non-capital context. In *Jackson v. Bishop*, the Eighth Circuit forbid the use of corporal punishment in state prisons based on the Eighth Amendment's prohibition of cruel and unusual punishment. 404 F.2d 571 (8th Cir. 1968). Additionally, in *Graham v. Florida*, the US Supreme Court held that juveniles who commit non-capital offences cannot receive life without parole. 560 U.S. 48 (2010). This reasoning was subsequently extended by the Court in *Miller v. Alabama*, which held that juveniles convicted of murder cannot receive mandatory life without parole sentences. 567 U.S. 460 (2012).
[43] By the time of the Justices' decision in *Coker*, the application of the death penalty to (alleged) cases of rape had long been understood to denote Jim Crow justice. However, the Court did not acknowledge this racialized history in its reasoning when it ruled on proportionality (Steiker and Steiker, 2016a: 264).
[44] 428 U.S. 153, 173 (1976).
[45] *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958).
[46] See, e.g., *Graham v. Florida*, 560 U.S. 48 (2010).

2010). According to this methodology, the Court must first consider 'objective evidence' of society's judgement of the acceptability of death penalty (i.e., legislative decisions and jury verdicts),[47] and second, the Court must provide its 'own judgment' as to whether the purposes of deterrence or retribution are met (Steiker and Steiker, 2016a: 277).[48] Upon this basis, the Steikers maintain that the Eighth Amendment is a powerful tool that should be weaponized by advocates to persuade justices to bring about a '*Furman* II' (2016a: 284-285).

With respect to the first part of proportionality review, the Court has ruled that it must be informed by *objective* standards to the 'maximum possible extent[.]'[49] Among these standards, the Court considers legislative decisions to be the utmost important,[50] and Steiker and Steiker (2016a: 282) observe that proportionality review 'always begins … with a legislative head count[.]' The Court imposed the earliest proportionality limit, against rape, in *Coker v. Georgia* largely on the basis that 49 states had already eliminated it from their laws.[51] However, the Steikers premise their blueprint for abolition on the less stringent approach to proportionality review taken by the Court in recent years: in cases from 2002 and 2005, the Court found that 30 states was a sufficient number to outlaw the death penalty for intellectually disabled and juvenile defendants, respectively (2016a: 278-279). Additionally, the Court held that the actual number of states that have abolished a particular punishment *de jure* is 'not necessarily dispositive' and that 'the speed and the consistency

[47] Unlike the equal protection and due process frameworks, where social consensus is at most 'atmospherically' relevant to justifying, for example, same-sex marriage and school desegregation, scholarship elsewhere notes that 'proportionality purports to rely on an objective assessment of whether the American people perceive something as acceptable' (Lucas, 2017: 285), and has included consideration of expert opinion, religious opinion, world opinion, and polling data. *Atkins*, 536 U.S. at 311-321 (2002).
[48] *Coker*, 433 U.S. at 593-597.
[49] *Coker*, 433 U.S. at 592.
[50] *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989).
[51] *Coker*, 433 U.S. at 595-596.

of the direction of change' must also be considered (2016a: 282).[52] Perhaps most critically, this aspect of the Court's evolving methodology is what prompted Steiker and Steiker (2016a: 282) to argue that establishing a national consensus for death penalty abolition should mean counting the states that are ADF (they note that 11 states had not carried out an execution in more than eight years), in addition to those that have abolished the death penalty *de jure* (19 at the time of their writing). They refer to ADF states as 'inactive death penalty states' and note that all but one had carried out three or fewer executions since 1976 (2016a: 365).

Additionally, as part of their blueprint for abolition, the Steikers stress that the Court ought to consider (1) the dramatic decrease in capital sentences and actual executions, (2) the governors and prosecutors who have imposed moratoria and declined to seek the death penalty, and (3) the views of professional legal organizations, diverse religious leadership, and the world community (2016: 282-284).[53] The authors also argue that the application of the Court's 'own judgment,' per the second part of the Court's methodology for proportionality review, could be used to encapsulate 'virtually all of the most powerful current concerns about the death penalty' (2016: 282), including challenges based on innocence, racial discrimination, and arbitrariness, as well as concerns about

[52] In determining whether to exempt intellectually disabled defendants from the death penalty, Justice John Paul Stevens tallied instances of successful legislation exempting such offenders and determined that the bills which passed 'overwhelmingly in favor of the prohibition' were to be given greater weight in his analysis than those passed by a simple majority (Steiker and Steiker, 2016a: 277-279). *Atkins*, 536 U.S. at 316. However, he also considered unsuccessful bills (in favor of prohibition) that had passed at least one legislative house in two states and included the establishment of a gubernatorial commission (recommending prohibition) in a third to support his finding that there were 30 states and a clear direction of change. *Id.* at 315. At this point, the Court also began considering other factors, such as expert opinion in scientific and sociological studies, to determine whether there exists a broad societal and professional consensus against a certain punishment. *Roper*, 543 U.S. at 569.

[53] *Atkins*, 536 U.S. at 311-321; *Roper*, 543 U.S. at 573-578.

lengthy delays on death row.[54] They maintain that proportionality is an especially convenient pathway since some of these challenges (i.e., innocence) have no precedent, but through the justices' 'own judgement', 'could support the more drastic limitation of wholesale abolition' (2016: 284; see also Steiker and Steiker, 2008: 735).

While the Steikers' blueprint appears promising, it treats ADF states as inherently abolitionist when they often present cyclical, or nonlinear, conditions that make them unreliable candidates for proportionality review. Moreover, as the next section of this dissertation will address, the Steikers' blueprint relies on a majority of supreme court justices to confer a categorical constitutional abolition even though its authors assert that the Court is not presently receptive to proportionality review.

ii. Problems Facing the Steikers' Blueprint

It is argued that the central danger of the Steikers' blueprint for abolition lies within their legislative headcount: that is, in their treatment of ADF states. The authors assume that the states which have not conducted executions in a set number of years are inherently on the road to abolition, or as equally evident of abolition as states which are abolitionist *de jure* (see also United Nations, 2020: 5). This is problematic for two reasons: first, ADF states are not always reliable for proportionality review, as the next section will illustrate using the example of Nebraska, and therefore, they threaten the success of Steiker and Steiker's abolitionist project. The Steikers' approach overlooks the complexity of circumstances in ADF states in assuming that they are abolitionist and asks justices to do

[54] Cormac Carney, a federal district judge in California, once argued that 'for the random few for whom execution does become a reality, they will have languished for so long on Death Row that their execution will serve no retributive or deterrent purpose.' *Jones v. Chappell*, 31 F. Supp. 3d 1050, 1053 (C.D. Cal. 2014). Justices Stephen Breyer and Anthony Kennedy have expressed similar concerns about the time that prisoners spend on death row. *Davis v. Ayala*, 576 U.S. 257, 288 (2015); *Glossip v. Gross*, 576 U.S. 863, 926-929 (2015); *United States v. Higgs*, 592 U.S. ___ (2021) (Breyer, J., dissenting) (slip op., at 3-4).

the same. Second, even if ADF states could be counted toward Steiker and Steiker's legislative headcount, the authors concede that the US Supreme Court is not currently receptive to proportionality review (2023: 5). Indeed, the Court has expressed 'a marked hostility toward further constitutional regulation' (2023: 1-2). Thus, it is argued by this author that possibilities for abolition must be considered outside the Court, even as the Court's regulation of capital punishment has inadvertently contributed to the rise of ADF, which will be described in Section iii of this chapter.

ADF States Do Not Reliably Bolster Proportionality

Putting aside for a moment the concerns of scholars with the application of proportionality review (see, e.g., Stinneford, 2008) and the disagreement of some justices with the doctrine *per se*, ADF states are not a reliable metric for the Steikers' legislative headcount because these jurisdictions, by definition, have not fully committed to abolition *de jure*. What this means is that ADF states are susceptible to 'uncertain political circumstances' that could prompt government officials to resume executions (Hood, 2021: 915). Professor Roger Hood, one of the few scholars that have reflected on the ADF phenomenon, identified how the inclusion of ADF states in any abolitionist tally could endanger the larger project of abolition:

> It is not acceptable to portray the ADF sub-category as being almost indistinguishable from the countries that have expunged the death penalty from all their laws or even their constitution. Indeed, to do so endangers the prospect of all countries accepting, as a matter of principle, that this punishment is utterly unacceptable. (2021: 917)

Although Hood was speaking about abolition on an international basis, it is argued that his concerns about ADF *countries* also apply to ADF states in the US, and thus, call into question the 'objective evidence' criterion of the Steikers' framework for proportionality

review. The inclusion of ADF states in the Steikers' analysis undermines the strength of the argument employed to convince the US Supreme Court of the size of the *national* consensus on abolition and mirrors the propensity of scholars elsewhere to bolster the abolitionist tally of states 'to marginalize further those who continue to execute' (Hood, 2014: 285).[55] Yet, it appears that no scholar has questioned the Steikers' incorporation of ADF states into their methodology, which this section will do using the example of Nebraska.[56] The central concern is that the Steikers' blueprint assumes that ADF states are progressing toward abolition when that may not be the case, and consequently, their blanket acceptance of ADF states as abolitionist fails to consider *why* these states have gone without executions.

ADF states necessarily complicate the Steikers' plan for abolition, and the faulty (but well-intentioned) reasoning behind the Steikers' blueprint is demonstrated when one surveys the variety of circumstances that characterize ADF states in the US. Abolition efforts may be non-existent or fall short in terms of legislative support, or succeed only to be thwarted by a determined, retention-minded governor, which has happened on more than one occasion in many ADF states.[57] Over the course of its modern death penalty history, efforts to repeal capital punishment in Nebraska, for example, have been consistently

[55] The differences in the definition and counting of ADF states reflects scholarly efforts to present a worldwide consensus toward abolition (s*ee infra* Introduction).
[56] Most recently, Dudai (2024: 144-146) argued against ascribing states with death penalty laws but no executions to 'the family of abolitionists' (i.e., a 'classificatory fallacy').
[57] In 1979, Nebraska Governor Charles Thone vetoed the first successful repeal bill in the country (Kelly, 2015), and in 2018, New Hampshire Governor Chris Sununu vetoed his state's first death penalty abolition bill (Ramer, 2018).

stalled or stifled,[58] and at one point, appeared to weaken in support,[59] before the state's unicameral, Republican-led state legislature finally succeeded in abolishing capital punishment in 2015 (Ethier, 2015; Lerner, 2015). Nebraska also illustrates how an ADF state may harbour retentionist sentiment but have no practical way of carrying out executions:

> While the nation remains divided over capital punishment, Nebraska stands out for its peculiar version of the institution: it's still wedded to the idea of executing prisoners, just not the practical part of doing it. The state is among a handful caught in a law vs. reality netherworld as legislatures and activists wrestle over how the issue will eventually play out. (Schulte, 2021)[60]

These various circumstances exemplify how the very nature of retention in ADF states makes them unreliable candidates for proportionality review, thereby jeopardizing the Steikers' blueprint for abolition. Unlike states that are abolitionist *de jure*, ADF states are likely to complicate any assessment of the pace and stability of change under the Eighth Amendment, since they do not always follow a consistent, linear path toward abolition (or at all). Uncertain (i.e., contingent) political events, such as the election of a pro-death

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[58] Legislators in Nebraska have introduced far fewer bills supporting the death penalty (less than 25) than those restricting it (nearly 50) (according to statistics from 1999 to 2018) (Ricknell, 2018: 12), yet attempts at abolition have consistently been thwarted: in 1979, Nebraska became the first state to legislatively abolish the death penalty when legislators approved a repeal bill by a vote of 25-17, but the governor vetoed it, and there were not enough votes to override his veto (Kelly, 2015). Similarly, in 1999, a legislative moratorium bill was passed by a vote of 27-21, but it was also vetoed (Legislative Research Division, 1999: 79; Stateline, 1999). Another repeal effort came within one vote of passing in 2007 (Gramlich, 2007).

[59] In 2008, state lawmakers in Nebraska debated death penalty repeal for the third time in three years. Public testimony supporting the repeal differed little from what had been presented to the Judiciary Committee the year before. However, representatives of the Police Chiefs Association and County Attorneys' Association spoke in opposition to repeal, and the repeal vote failed by a larger margin than in 2007 (Koch, Wark and Galliher, 2012: 113-114).

[60] The Supreme Court of Nebraska ruled that electrocution constituted 'cruel and unusual punishment' under the state constitution in 2008. *State v. Mata*, 745 N.W.2d 229 (2008). In Idaho, where there are currently nine prisoners on death row, state lawmakers recently introduced an alternative method of execution to combat a shortage of execution drugs (Maldonado, 2023). Nebraska has no supply of lethal injection drugs and is unlikely to procure any in the future (Schulte, 2021), especially following a lawsuit in 2020 against the Nebraska Department of Correctional Services (NDCS). Court records revealed that the NDCS executed Moore using drugs from a Nebraska pharmacy in violation of the distribution policies of multiple pharmaceutical manufacturers, who prohibit their sale for use in executions (Hammel, 2020; Pilger, 2020).

politician, can substantially affect abolitionist support and states' ability to translate death sentences into executions.

By assuming that ADF states are inherently moving toward abolition, Steiker and Steiker's blueprint also overlooks the possibility that ADF may signal a more entrenched death penalty than people realize. Following the abolition victory in Nebraska in 2015, the Republican governor, Pete Ricketts, attempted to veto the abolition legislation, forcing the Nebraska Legislature to rally to overrule his veto (Bosman, 2015). Ricketts then helped finance a citizens' ballot initiative (Levy, 2016), and Nebraskans voted to reimpose the death penalty a year later, in 2016, against the will of the state legislature (Pena, 2016). Since then, there have been four new death sentences and one execution in Nebraska (Death Penalty Information Center, 2022a), but the shortage of lethal injection drugs has inhibited further executions and prompted some legislators to consider adopting nitrogen hypoxia as an alternative execution method (Hammel, 2024b). Meanwhile, abolition-minded legislators have had little success in advancing another repeal bill out of committee, especially against legal and political proponents' assertions that public opinion on capital punishment in Nebraska has not changed (Hammel, 2023; 2024a). Nonetheless, Steiker and Steiker (2016b) made the following observation after the state's successful death penalty repeal: 'state legislatures have moved in only one direction on the question of capital punishment' (see also 2016a: 282).[61]

The analysis by Steiker and Steiker does not recognize the complicated, cyclical circumstances that have defined ADF in Nebraska nor any other state. The fact that

[61] At the time of their writing, Steiker and Steiker (2016b) remarked that six state legislatures (New Jersey, New Mexico, Illinois, Connecticut, Maryland, and Nebraska) had abolished the death penalty, and none had reinstated it, while two other state legislatures (New York and Delaware) declined to revive the practice after their state supreme courts struck it down.

Nebraska returned to execution, *even* after abolition *de jure*, has everything to do with the structure of the American polity and the nature of death penalty discourse, but also the circumstances that made it an ADF state. Perhaps what is most telling about the condition of the death penalty in Nebraska is the fact that it reinstated the death penalty in 2016, but remained ADF until 2018, when Carey Dean Moore, a 'volunteer,' relinquished his appeals and was executed (Duggan, 2018; Smith, 2018).[62] Nebraska had not executed a prisoner in over 20 years,[63] and its return to execution marked the fifth time that a state had resumed executions in the US because of the wishes of a volunteer (Death Penalty Information Center, 2023b).[64] The reality that Nebraska ended its more-than-20-year period of ADF with the execution of a *volunteer* raises questions about Nebraska's commitment to retention (despite the popularity of pro-death penalty rhetoric) and the multitude of factors that play into a state's becoming, and remaining, ADF.

These facts and more evince a jurisdiction clearly at odds with abolition *and* retention, given the array of complicated factors that have collided over Nebraska's death penalty statute, and emphasizes why Steiker and Steiker should revisit their 'raw legislative head count' (2016: 282). The reinstatement of the death penalty in Nebraska and its return to executions[65] is likely to be a point of contention for justices amenable to proportionality review in the future, and this is because ADF states, properly understood, may reflect a reluctance to let certain punishments go, rather than any 'evolving standards of decency'.[66]

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[62] Since 1976, the only prisoners executed in Connecticut, New Mexico, Oregon, and Pennsylvania have been volunteers (Death Penalty Information Center, 2023b).
[63] When Robert E. Williams was executed in 1997, he was the third prisoner to die in Nebraska's electric chair since 1994 (Gibson, 1997).
[64] Executions of volunteers ended capital punishment pauses of 5 years and 6 years in South Dakota, 7 years in Louisiana, 9 years in Kentucky (Death Penalty Information Center, 2023b).
[65] Prior to abolition, Nebraska had not executed a prisoner since 1997, or in 18 years (Bouffard, 2015).
[66] According to Steiker and Steiker (2023: 43), the Eighth Amendment embraces a 'Durkheimian view of societies becoming less punitive as they "mature"' (2023: 43). Stinneford (2010: 88) similarly observes that

As one scholar notes, capital punishment is exceptionally durable and 'cannot be ignored or disposed of by hazy dialectics or confusing generalizations' (Radzinowicz, 1999: 293, cited in Hood, 2014: 274). Circumstances like those that define Nebraska are rare, but they have encouraged this author to consider how easy it is to misjudge the trajectory of an ADF state, especially when contingent events (e.g., the success of a pro-death penalty ballot initiative) tend to characterize ADF states. Unforeseen political events can prompt the reinstatement of the death penalty even where there has not been an execution for 10 years, and even if a state's history of *practice* also suggests it would not return to the death penalty. One is no longer able to resist so clearly 'the conclusion that [no] consensus exists against [abolition]'[67] and the danger (or at least, the uncertainty) that ADF may spell for a state's future trajectory, which makes these states unreliable stock for proportionality review.[68]

Lastly, some might argue that the acceptability of the Steikers' inclusion of ADF states in their blueprint is a moot point since a categorical constitutional abolition would invalidate the death penalty nationwide. However, it is the contention of this author that a future iteration of the US Supreme Court might revisit such a decision (especially if they treat decisions based on proportionality review with hostility) on the grounds that the addition of such states is disingenuous (i.e., an incorrect headcount) and lacks any basis in law (see Steiker and Steiker, 2023: 63).

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the evolving standards of decency test was intended to '[reflect] the Warren Court's faith in the inherently progressive nature of history … [and] free the Court from the constraints of an earlier and more vengeful past.' Thus, the inclusion of ADF states in a blueprint for abolition is counterintuitive, as these jurisdictions allow the death penalty to remain in law and sometimes sentence individuals to death.

[67] *Roper*, 543 U.S. at 567.

[68] Legislative abolition might have occurred more frequently over the past decade than before (Steiker and Steiker, 2016a: 282), but ADF has not been 'a necessary or even typical precedent to finally abolishing the death penalty completely' (Hood, 2021: 913).

When deeming punishments cruel and unusual by its own judgement, the Court has always asserted that such decisions were backed by contemporary standards of decency (Stinneford, 2010: 88). Yet, the Steikers ask the Court to interpret ADF states as abolitionist even when, by definition, they have not yet abolished the death penalty *de jure* (and may not be progressing toward abolition *de jure*). The rejection of a ruling based on the Steikers' blueprint for abolition is plausible when one considers the Justice Antonin Scalia's criticism of proportionality review. In 2005, Justice Scalia took issue with the Court's inclusion of states that did not explicitly outlaw the exemption being sought (in this case, the exclusion of juveniles from death sentencing and execution):

> In an attempt to keep afloat its implausible assertion of national consensus, the Court throws overboard a proposition well established in our Eighth Amendment jurisprudence. … Consulting States that bar the death penalty concerning the necessity of making an exception to the penalty for offenders under 18 is rather like including old-order Amishmen in a consumer-preference poll on the electric car. Of *course* they don't like it, but that sheds no light whatever on the point at issue. That 12 States favor *no* executions says something about consensus against the death penalty, but nothing—absolutely nothing—about consensus that offenders under 18 deserve special immunity from such a penalty. In repealing the death penalty, those 12 States considered *none* of the factors that the Court puts forth as determinative of the [juvenile death penalty.][69]

Justice Scalia's refusal to consult states *other* than those that have explicitly barred the exemption in question for proportionality review implies the unacceptability of the Steikers including ADF states within their legislative headcount, since these states have not definitively rejected the death penalty on a legal basis. The Steikers' incorporation of ADF states into their blueprint runs afoul of their very own recognition of a central holding in *Trop*, the original 'evolving standards of decency' case, which held: 'the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it

[69] *Roper v. Simmons*, 543 U.S. 551, 614 (2005) (Scalia, J., dissenting).

cannot be said to violate the constitutional concept of cruelty'[70] (Steiker and Steiker, 2023: 43). Any majority of the Court that adheres to Scalia's views, then, would likely overturn a decision based on the Steikers' blueprint (or reject it outright).

To achieve nationwide abolition by judicial decree, then, appears to require at least seven more states to abolish their capital punishment systems, since 23 states are abolitionist as of June 2024 (Death Penalty Information Center, 2024b). This is because the evolving standards of decency test is designed to invalidate punishments that 'are already on the way out' (Stinneford, 2008: 1825; see also Berry III, 2007: 22-23). Under such an analysis, the Steikers' blueprint would likely appear less like a strategic legal manoeuvre and more of an appeal to a broader spectrum of supreme court justices. This is to say, the authors need to base their finding of a national consensus less on the decline in *death sentences* and *executions* (2023: 6-7) and more on the actual movement of states on the issue of the legal *permissibility* of the death penalty (which is arguably more dispositive to conceptions of societal decency).[71]

All of this to say, critiquing the Steikers' blueprint assumes that the success of the Steikers' blueprint (as well as its longevity) comes down to a matter of how one should define and treat objective indicia, particularly ADF states. Yet, as the next section will address, Steiker and Steiker (2023) posit that the Court is not currently amenable to proportionality review at all, and instead, has begun to exhibit an aversion to practice *per se*, as a matter of constitutional interpretation. It is argued that the current Court's rejection

[70] *Trop*, 356 U.S. at 99 (1958).
[71] Steiker and Steiker (2023: 1) support their argument for abolition by detailing 'the great decline of the American death penalty': that is, between 2000 and 2015, death sentences declined over 80 percent (from more than 300 in 1996 to less than 50 in 2015) and executions became less frequent (from 100 in 1999 to fewer than 30 in 2015). They also note that six states abolished the death penalty between 2007 and 2015 (2023: 3-4).

of proportionality, however, is not surprising, given the various issues that scholars have raised with the practice.

The Court is Not Presently Receptive to Proportionality Review

In their latest journal article, Steiker and Steiker (2023: 1-2) argue that the US Supreme Court is not currently amenable to proportionality review given its new members' views on the constitutional interpretation of the Eighth Amendment (see also Callahan, 2022; Lockhart and Hill, 2020). As such, this section seeks to describe a few of the rationales driving the present Court's rejection of proportionality review, and what this means for ADF states, before turning to address how this aspect of 'the federalist structure of government' (2023: 61) has contributed to ADF across states.

When the Steikers proposed their blueprint for abolition in 2016, it was widely expected that the Court would deliver the categorical constitutional abolition of the death penalty (2023: 39), considering the punishment's 'substantial withering … on the ground' and the Court's recent decisions curtailing the scope of the death penalty (2023: 5). *Time* magazine had even run a cover featuring Virginia's electric chair, inscribed with the headline for an article titled, 'The Last Execution: Why the Era of Capital Punishment is Ending' (see Figure 3) in anticipation of such a decision. The article placed particular emphasis on the justices' recognition 'that the modern death penalty is a failure' (Von Drehle, 2015), bolstering the assumptions of the Steikers and others that abolition was imminent (see also Caplan, 2015; Mandery, 2015; Smith, 2015). But the Steikers noted the role of contingency in their analysis: 'a '*Furman* II' seems likely in the coming decade or two—but only if justices who leave the current Court are replaced with justices who hold similar or more liberal views' (Steiker and Steiker, 2016: 289). Ultimately, the change in

the Court's composition, however, went in the exact opposite direction, due to the (unexpected) outcome of the 2016 presidential election:

> The 2016 election demolished any thought of judicial abolition. President [Donald] Trump made three [US Supreme] Court appointments, replacing two Justices (Kennedy and Ginsburg) who were essential to the Court's new searching scrutiny of the death penalty (as well as Justice Scalia), and the new Justices (Gorsuch, Kavanaugh, and Barrett) appear hostile to significant constitutional regulation of the death penalty.

According to the authors, the new appointments represent 'a solid six votes against constitutional abolition of the death penalty—and indeed, against the entire project of constitutional regulation of capital punishment' (2023: 40). Indeed, these justices (and to an extent, one of their predecessors, Justice Antonin Scalia) have taken aim at the constitutionality of proportionality review, and under their analysis, the problems associated with gauging an objective societal consensus reflect the unnecessary intervention of the federal judiciary in state issues (Steiker and Steiker, 2023; see also Bazelon, 2024; McArdle, 2023). As one scholar explains, '[t]he conservative lean of the current Court is more likely to narrow the Eighth Amendment than expand it' (Berry III, 2020a: 99).



Figure 3. Lucinda Devlin's photograph of the electric chair in Virginia made the cover of *TIME* magazine, alongside a headline for David von Drehle's article discussing the end of capital punishment in America (see Von Drehle, 2015).

The newly appointed justices maintain that the death penalty is constitutionally permissible and have expressed 'antipathy toward 'evolving standards' … [for] the prospect of its role in abolishing the death penalty entirely' (2023: 44). Specifically, Steiker and Steiker (2023: 45) bring attention to the 'originalist' grounds upon which Justice Neil Gorsuch recently defended the constitutionality of capital punishment: in *Bucklew v. Precythe*, he argued that, because the death penalty (1) was authorized for all serious crimes when the US was founded, (2) is recognized in the text of the Fifth Amendment, and (3) was permitted by the First Congress, which proposed the Eighth Amendment, it is constitutional.[72] In their article, the Steikers affirm that the new majority of justices is

[72] 587 U. S. ___ (2019) (slip op., at 8-9).

unconvinced that the constitutionality of the death penalty hinges on 'evolving standards of decency'[73] and explain that the new majority has taken to treating the constitutionality of capital punishment as a 'historical, permanent fact, rather than, as in *Trop* and *Gregg*, a contingency based on prevailing standards of decency' (2023: 45).[74] Most crucially, Steiker and Steiker (2023: 45) point out that, for this new majority, 'prevailing standards [of decency] are simply not pertinent to the constitutional question [of the death penalty]'.

The new Court majority's 'implicit rejection of *Trop*' (2023: 52), however, is not surprising. Scholars have long argued that the Court's evolving methodology is flawed for relying on 'informal, and perhaps imprecise, empirical analysis of statutes, executions, and the direction and consistency of change' (Lucas, 2017: 286; see also Moriearty, 2017; Stinneford, 2008; 2010). The Court has primarily looked to legislative decisions and jury verdicts to gauge levels of change under proportionality review, and Steiker and Steiker (2023: 52) acknowledge that Justice Anthony Kennedy (the architect of several Eighth Amendment prohibitions) 'looked broadly' to determine evolving standards of decency. However, scholars argue that these metrics 'do not always accurately capture the complexity of attitudes regarding the death penalty' (Lucas, 2017: 279-280) and are 'remarkably opaque' (Stinneford, 2008: 1753). They point out that determining the exact rationales behind these 'objective' criteria is challenging:

> If a state legislature imposes the death penalty for murder but not for rape, does this mean that the legislature morally condemns the death penalty for rape? Or might such legislation reflect a relatively weak policy preference? Might it merely reflect

[73] '[T]he entire body of Eighth Amendment law took a wrong turn when the Court looked to 'evolving standards of decency' as the framework for evaluating punishment practices'. *Glossip*, 576 U.S. at 893-94 (Scalia, J., concurring).

[74] Lockhart and Hill (2020: 34) also argue that the 'evolving standards of decency' framework has created 'a non-static standard that can vary with the composition of who sits on the bench'. *See Weems v. United States*, 217 U.S. 349, 373-374 (1910).

> the pragmatic judgment that imposition of the death penalty for rape is likely to be struck down by the Supreme Court? (Stinneford, 2008: 1753)

Stinneford's analogy (which holds true for every retentionist state in the US) shows how legislative enactments cannot be expected to reliably gauge the public's views on the acceptability of capital punishment, let alone the motivations driving the voting patterns of legislators (Lucas, 2017: 279; see also Smith, 2015: 866-869). Similarly, single question approaches to measuring public opinion (i.e., opinion polls and state referenda) do not reflect the complexity of societal attitudes toward the death penalty (Longmire, 1996: 96-97; Lucas, 2017: 279-280; Zamble and Kalm, 1990: 378-328). Unlike elected officials, poll respondents and voters are not typically exposed to comprehensive evidence of 'how capital punishment works in *practice* rather than in *theory*' (Steiker and Steiker, 2016b). So, these individuals generally respond at the level of symbolism: that is to say, populist, majority sentiment about 'morality policy' (see Mooney and Lee, 2000: 230) tends to 'symbolically [embody] the expressive desire and moral imperative to take action against crime and perceived disorder' (Kort-Butler and Ray, 2018: 489; see also Garland, 2010). What this means is that practically every punishment that comes under the US Supreme Court's Eighth Amendment microscope is going to command strong public support (Stinneford, 2011: 905), and the death penalty is no exception, given the 'oversimplified conceptions of attitudes toward the death penalty and its application' (Murray, 2003: 753). Understandably, the Court's imposition of its 'own judgement' was meant to counterbalance the more punitive 'majoritarian implications' of the Eighth Amendment (Stinneford, 2010: 88). However, several authors stipulate that this has resulted in the subtle, though sometimes overt, 'manipulation' of the evolving standards of decency test

(Stinneford, 2008; 2011; see also Lain, 2010; Miller, 2023), which is part and parcel of the newer Court majority's condemnation of proportionality review, as will be discussed next.

Perhaps what is most pertinent to the current Court's rejection of proportionality review is the charge that the Court has previously manipulated the methodology of proportionality review to achieve certain outcomes (Miller, 2023; Stinneford, 2008). Justice Antonin Scalia put it succinctly: 'time and again, a vocal minority of this Court has insisted that things have "changed radically," and has sought to replace the judgments of the People with their own standards of decency.'[75] This contention is particularly evident with respect to the Court's assessment of 'the consistency of the direction of change', and as such, the ADF phenomenon likely spells adverse implications for proportionality review.[76] In determining the 'evolution' of societal standards, the US Supreme Court has only ever considered progress *toward* the abolition: for example, it has counted instances of unsuccessful abolition legislation and referred to the lack of public support for laws that could be perceived as soft on crime (Steiker and Steiker, 2016a: 278),[77] even when a majority of states still authorized the particular punishment (e.g., the execution of juveniles) in question.[78] This 'increased assertiveness of judicial will' (Stinneford, 2008: 1757) has led some justices to take issue with the entire project of proportionality review, particularly Justice Scalia, who seemed to anticipate the drawbacks of such an approach when the Court decided to categorically exempt intellectually disabled offenders from capital punishment in 2005:

> But in what other direction *could we possibly* see change? … [*A*]*ny* change (except precipitate undoing of what had just been done) was *bound to be* in the one

[75] *Glossip*, 576 U.S. at 899 (Scalia, J., concurring).
[76] *Atkins*, 536 U.S. at 315.
[77] *See Atkins*, 536 U.S. at 315; *Roper*, 543 U.S. at 566.
[78] See *Atkins*, 536 U.S. at 314-16; *Roper*, 543 U.S. at 566.

> direction the Court finds significant enough to overcome the lack of real consensus. That is to say, to be accurate the Court's "consistency-of-the-direction-of-change" point should be recast into the following unimpressive observation: "No State has yet undone its exemption of the [intellectually disabled], one for as long as 14 whole years." In any event, reliance upon "trends," even those of much longer duration than a mere 14 years, is a perilous basis for constitutional adjudication.[79]

In Justice Scalia's view, 'either "society has set its face against" a practice or it has not' (Steiker and Steiker, 2009: 112). His dissent emphasizes how 'the consistency of the direction of change' regarding societal acceptance of the death penalty has been, and could be, manipulated by those looking to achieve certain results, particularly the invalidation of capital punishment. This implicates the ADF phenomenon because, under the Court's 'evolving' methodology, justices would overlook the retentionist aspects of ADF states, and consult only the evidence indicative of 'change' (e.g., a state senate vote that falls short of abolition). Consequently, there would be no discussion about the difference between forms of death penalty retention (i.e., 'inertial retention' or 'intentional retention') (discussed in Chapter Two) in ADF states, because any movement *toward* abolition would be enough to consider the state representative of a larger abolitionist 'trend'. But the Court's interpretation of ADF states as anything other than retentionist would amount to the manipulation of proportionality review through its 'own judgement', which brings us back to Roger Hood's (2021) point about ADF states lacking a commitment to abolition *de jure*. As Stinneford (2008: 1757) posits, one may agree with the outcomes of the Court's approach to proportionality review but find its methodology profoundly troubling.[80]

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[79] *Atkins*, 536 U.S. at 344-345 (Scalia, J., dissenting).

[80] The lens with which some justices have viewed proportionality review is reflected in Justice Clarence Thomas's concurring opinion in *Glossip*: 'To the extent that we are ill at ease with these disparate outcomes, it seems to me that the best solution is for the Court to stop making up Eighth Amendment claims in its ceaseless quest to end the death penalty through undemocratic means.' *Glossip*, 576 U.S. at 908 (Thomas, J., concurring).

Stinneford (2008: 1757) concludes, '[i]f evolving standards of decency is merely window-dressing for judicial will, then it is not merely an incorrect standard; it is not a standard at all'.

The new justices' aversion to proportionality review appears more palatable, or at least, understandable, given (1) the scholarly criticisms of the objective standards (i.e., legislative decisions, jury verdicts, and polling data) used to gauge societal consensus and (2) the manipulation of the proportionality doctrine. By implicitly rejecting proportionality review, the Court seeks to absolve itself of the difficulty of interpreting 'trends' and avoid the risk of colouring outside the scope of constitutionally permissible conduct.[81] The Steikers' blueprint for abolition, however, maintains that a future iteration of the Court will accept these flaws in pursuit of the abolition of the death penalty (2016a: 282-285). Both points raise questions about the function of the US Supreme Court as a countermajoritarian institution, which is relevant to the persistence of the ADF phenomenon.

First, where proportionality review is concerned, academics have questioned whether the Court is in a better position than the legislative branch to determine the appropriateness of punishments (Berry III, 2007: 21-24; Lain, 2010: 678; Stinneford, 2020: 39-41), particularly Professor Lauren Lucas:

> Some may view proportionality analysis as an effective tool to force states that are out of step or too stubborn to recognize what is right, to align with the will of a bare and righteous majority. But when the will of that majority is not clearly [discernible], and a significant number of voters and states continue to express support for the death penalty, a decision based explicitly on an assessment of contemporary values may place a strain on the Court's institutional legitimacy. (Lucas, 2017)

[81] Steiker and Steiker (2023: 46) predict that the current Court is 'more likely to roll back the limited protections against extreme practices that … [it] has already embraced' but not reject proportionality review entirely. They relate this to Justice Scalia's willingness to uphold proportionality review in capital cases on account of the 'death is different' principle (2023: 46). Justice Scalia said of proportionality review: 'We would leave it there, but will not extend it further.' *Harmelin v. Michigan*, 501 U.S. 957, 994 (1991).

The threat to the Court's legitimacy posed by the application of its 'own judgement' explains Justice Gorsuch's declaration that 'the judiciary bears no license to end a debate reserved for the people and their representatives'.[82] This is to say, the current Court has washed its hands of proportionality review, largely because the evolution of the 'evolving standards' doctrine has been 'affected by a zeitgeist of larger social and political currents that have nothing to do with the law' (Lain, 2010: 678).[83] Ultimately, the question of whether the death penalty is morally permissible is a 'deeply personal and moral decision', whereas the question of its fair and proper administration 'is one squarely within the Court's domain' (Lucas, 2017: 286).[84] The new justices may not be willing to jettison proportionality review entirely, but the issues associated with its development and implementation evince why 'the current Court is … 'not ready' to provide the coup de grace to the American death penalty' either (Steiker and Steiker, 2023: 46).

Second, and in line with the first point, the new Court's rejection of proportionality review highlights how the structure of the American polity facilitates ADF. The Steikers understandably insist on their blueprint for an important reason: 'American federalism cedes primary authority over criminal justice matters to individual states and permits—indeed, celebrates—wide variation among the states' (2016a: 256). What this means is that, absent the US Supreme Court declaring the categorical nationwide abolition of the death

[82] *Bucklew*, 587 U.S. ___ (2019) (slip op., at 9).
[83] Lain (2007: 74) has argued elsewhere that, '[i]n the death penalty context and beyond, the Court's inclination to protect is profoundly influenced by the social and political setting in which it operates. We ought to recognize that fact and rethink our reliance on the Supreme Court to protect unpopular minorities from the tyrannical potential of majority rule.'
[84] According to Steiker and Steiker (2016a: 322), '[i]f the United States arrives at abolition, it will do so not primarily because of noble considerations marking moral advancement but rather because of particular features of the American terrain, most notably the failed and perhaps impossible effort to improve capital punishment with the lofty but limited power of the Constitution.'

penalty, some states will continue to authorize capital punishment even if they do not use it frequently, or at all (2023: 61). In other words, when political and legal elites will not or cannot abolish the death penalty, it is likely to persist in law, if not also in practice, since 'many … would still have [the death penalty] if the democratic will prevailed.'[85] Or as one scholar puts it, 'whenever the death penalty has been abolished in a Western country it would have been retained if that matter had been put to a public vote' (Gross, 1993: 97),[86] highlighting the salience of 'criminal justice populism' (Sarat, 2019: 6).[87] Based on this account, ADF may exemplify how a judicial *or* legislative body has failed to subvert the will of the majority, whether on the state or national level. This brings us back to the concerns that some have about proportionality review and the legitimacy of the US Supreme Court.

Overall, the problems facing proportionality review necessitate that one turns to statewide abolition processes as a means of curbing the death penalty in the US. Perhaps Anthony Amsterdam, the attorney who argued *Furman*, put it best: 'for many years to come, the forum for litigation aimed at ending the death penalty cannot sensibly be the Supreme Court of the United States' (Amsterdam, 2022). But the Court's unwillingness to declare the death penalty unconstitutional does not mean it has taken a completely hands-off approach to the death penalty: instead, as the next section will discuss, its intervention

[85] *Kansas v. Marsh*, 548 U.S. 163, 187 (2006) (Scalia, J., concurring).
[86] According to Sarat (2019: 6), voters across 15 different states have been asked to decide the fate of the death penalty on 29 different occasions since the early twentieth century, and abolitionists have lost 25 times. He says that 'voters decide how to vote on these measures along narrow lines of self-interest' (Sarat, 2019: 13). Only 26 states allow for citizen-initiated ballot measures (Thomas, 2023).
[87] When the Nebraska electorate decided to reinstate capital punishment, Democratic state Senator Ernie Chambers said it was 'not unexpected … [and] it's not a surprise' (Ozaki, 2016). In each of his 36 years in the Nebraska Legislature, Chambers championed a repeal bill and/or some form of death penalty restriction (Koch, Wark and Galliher, 2012: 107; Pilkington, 2015).

in state court processes has arguably contributed to the persistence of ADF on a state-by-state basis.

iii. The US Supreme Court's Intervention (and Lack Thereof) Has Induced ADF

One of the most important points that Steiker and Steiker (2016a) raise in *Courting Death* is that the US Supreme Court's decision to regulate the death penalty has had several unanticipated consequences (see also Brandenburg, 2007: 1449; McArdle, 2023; Steiker and Steiker, 2023: 34-37).[88] Perhaps most notably, in regulating the death penalty, the Court has inadvertently legitimized capital punishment (2016a: 191) and created 'state capital systems that are worlds apart' (2016a: 121), all while failing to address the issues of arbitrariness and discrimination (2016a: 4) that caused it to intervene in state death penalty practices in the first place. As this section will set out, the Court's regulatory approach has resulted in the creation and persistence of ADF in various states across the US. Specifically, the Steikers' analysis suggests that the Court has contributed to ADF by (1) promulgating certain safeguards for capital defendants, making the process of securing a capital sentence much more costly and tedious (2016a: 113), and (2) directly facilitating death penalty retention when state actors (i.e., state supreme court justices) have rejected it (2016a: 127).

Steiker and Steiker (2016a: 79; 94-97) argue that the Court's refusal to address racial discrimination in the administration of capital punishment presents a missed opportunity for abolition (see also Steiker, 2012), which has, ironically, resulted in safeguards that frequently stall the imposition of capital punishment.[89] According to the

[88] In *Furman v. Georgia*, Justices Thurgood Marshall and William Brennan 'explicitly conclude[d] that so sweeping a determination is mandated by the Constitution' and 'call[ed] for the abolition of all existing state and federal capital punishment statutes.' 408 U.S. 238, 415 (1972). Following *Furman*, the two Justices dissented from every capital case that came to the Court (Cohen and Steiker, 2022).

[89] In *Furman*, Justice Powell specifically noted that he would put racial discrimination 'to one side'. 408 U.S. at 310. See also, *Rudolph v. Alabama*, 375 U.S. 889 (1963); *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

authors, the Court's aversion to addressing racial discrimination throughout the 1970s and 1980s was rooted in the justices' various anxieties, perhaps best reflected by Justice Lewis Powell's concern about the potential scope of a substantive remedy to racial bias (2016a: 106-109). Justice Powell believed that a decision recognizing statistical racial disparities as grounds for invalidating capital punishment would destabilize the entire criminal justice system, given that similar disparities are likely present in the imposition of noncapital punishments and '[cannot] be simply excised from the legal system' (2016a: 108).[90] As a result, the Court's regulatory approach has given rise to the misleading impression that the key deficiencies of the American death penalty system can be found in specific, isolated problems (namely, the death qualification of jurors, unitary trials, and the lack of standards in state capital statutes) (2016a: 109-110). This has left the pervasive issue of racial bias largely unaddressed, but the exclusion of race from the discussion has led the Court to require individualized sentencing and heightened representation in capital trials (2016a: 112), whereupon states must offer a legal mechanism for the evaluation of mitigating evidence, and defence counsel must investigate and present the case for life in capital trials, respectively (2016a: 112-115).

Paradoxically, these two 'strands' of contemporary capital jurisprudence have brought executions in many states to a halt, since they have 'proven extraordinarily costly' safeguards against arbitrary convictions (2016a: 113; see also Lucas, 2017: 283; Steiker and Steiker, 2023: 62). In other words, the Court has inadvertently impeded the application of the death penalty in requiring higher standards for its imposition, or what some authors

[90] See *McCleskey v. Kemp*, 481 U.S. 279 (1987). In reviewing *Courting Death*, Professor Sheri Lynn Johnson (2018: 206) reflected on this point: 'When [addressing racial discrimination] would have cost something more than relief in an individual case, as in *McCleskey*, the price to the majority seemed too high'.

call ‘super due process’ (e.g., Garland, 2010; Hood and Hoyle, 2015). As will be discussed in Chapter Three, the constitutional guarantee of an *adequate* defence has (1) led state and federal courts to reverse death sentences and (2) made seeking and defending against death in Kansas and Wyoming an extraordinary costly endeavour, one that frequently threatens to bankrupt entire state systems.

On the other hand, however, the US Supreme Court has frequently used its regulatory powers to police the decisions of certain state and lower federal courts (2016a: 126), which has seemingly fostered the development of ADF. Particularly relevant to the case studies in Chapter Three is the Steikers’ observation that the justices have (1) heard an unusually large number of Kansas capital cases and (2) frequently reversed the Kansas Supreme Court for its ‘excessive solicitude … toward capital claims’, even when there is not a ‘broad’ or ‘interesting’ capital issue at stake (2016a: 127). By frequently (1) overturning individual death sentences and (2) in one case, invalidating the state’s death penalty statute, the Court has perpetuated a system where the death penalty is upheld, regardless of state officials’ attempts to mitigate its use. This dynamic creates an environment where ADF can thrive, as the overarching authority of the US Supreme Court stymies statewide reforms and maintains the death penalty as a constitutional punishment. Though the authors do not describe the specific circumstances of cases in Kansas and Wyoming, they are arguably emblematic of how the Court’s intervention has given rise to ADF and will be discussed in Chapter Three.

This section has sought to illuminate how the US Supreme Court’s regulation of the death penalty has perpetuated the existence of ADF, entrenching the death penalty further into the fabric of the American judicial system. The Steikers are adept at setting out the

contingent nature of ADF, a 'limbo' arrangement (Dudai, 2024), and their scholarship helps frame the Court's role in the events that have stabilized capital punishment on a state-by-state basis, which Chapter Three will discuss in greater detail. Even as the Court appears determined to 'prevent overenforcement of federal constitutional norms' (2016a: 127), Steiker and Steiker (2023: 7-29) argue that the death penalty will continue to decline across the US, because of the many and various forces against it, namely: cost, the changing political dynamics of large urban areas, the decreasing power of the death penalty as a wedge issue, and the growing isolation of the US in its retention. These factors raise questions about the emergence, and function, of ADF in the states, as Chapter Three will explore. As Steiker and Steiker (2016a: 216) conclude, 'the death penalty appears to be headed toward its grave … [but] nobody seems particularly inclined to give it a respectful burial' on account of 'the substantive and procedural restrictions of twenty-five years of Eighth Amendment constraint' (Steiker, 2012: 784). This project now turns to introduce a theoretical framework based on historical institutionalism and path dependence, which will provide the lens through which to examine ADF in Chapter Three.

Chapter Two: Theoretical Approach

This chapter will explore the extent to which the historical-institutional approach can be applied to understanding the development and persistence of ADF in Kansas and Wyoming.[91] It will start by describing historical institutionalism and its central concept, path dependence, in Part A. Here attention is given to the scholarly literature that sets out

[91] The historical-institutional approach has mostly been adopted by scholars in studies of organizational management and political science (see, e.g., Mahoney, 2001; Nichols, 2015; Sydow, Schreyögg and Koch, 2009) and rarely applied to studies of punishment (Rubin, 2023: 266). However, Heather Schoenfeld's study of the 'carcel state' in Florida is a notable exception (Rubin, 2023: 273), since it discusses the way in which feedback effects, a condition of path dependence, affect penal policy (see Schoenfeld, 2018).

the two conditions of path dependence, contingency and self-reinforcement, and its outcome, 'a specific state of persistence called lock-in' (Vergne and Durand, 2010: 739; see also Liebowitz and Margolis, 1995; Pierson, 2004; Sydow, Schreyögg and Koch, 2009). By drawing on competing theories, Part A creates and presents a more cohesive theoretical framework ('AIMS') to guide the case studies in Chapter Three.

Part A then turns to describing Dudai's (2023) application of historical institutionalism to a case study of death penalty retention in Israel. It is argued that some of the weaknesses of the theory (namely, its bent toward determinism and non-generalizability) can be resolved by using two of its analytical tools simultaneously. Dudai's identification of 'near-misses' using the narrative case study method also illustrates how historical institutionalism can be used to counter the progressive fallacy that dominates abolitionist discourse (Hood, 2021; Dudai, 2024). This fallacy is particularly dangerous because it overlooks the subtle transformation of the death penalty 'into an institution serving political-symbolic functions' (Dudai, 2024: 139), as might be the case in Kansas and Wyoming.

Next, Part B shifts gears to make the case for an even more robust theory of path dependence to produce a thorough and nuanced analysis of ADF in Chapter Three. This section argues that ADF should be assessed through the lens of federalism and 'co-evolutionary lock-in' (see Burgelman, 2002), and sees AIMS adapted for interpreting the hierarchical distribution of authority in federal systems (e.g., Broschek, 2013; Kincaid, 2019; Orren and Skowronek, 2004). Such a strategy is useful because it considers ADF as a multi-causal condition operating in an 'open system', where it is understood that the

interplay of law and politics at various levels of government has affected the retention of the death penalty in Kansas and Wyoming.

A. Defining a Conceptual Framework Using a Historical-Institutional Lens

The historical-institutional approach is often employed by scholars looking to understand a specific decision and/or the cause of a particular result (Dudai, 2023: 19; Steinmo, 2012: 126), which makes it well-suited for a study of why the death penalty is retained, but not carried out, in the Midwestern and Western US. Kansas and Wyoming have delivered few capital sentences and executions in the modern death penalty era, and instead of using the death penalty as a genuine law enforcement tool (Death Penalty Information Center, 1995), state actors appear to retain it as 'an exceptional, symbolic, [and] political institution' (Dudai, 2024: 150). Yet, it remains unclear whether Kansas and Wyoming retain the death penalty as a matter of inertia (i.e., there is no pressing reason to alter policy) or intention (i.e., political actors invest and commit to maintaining capital punishment) (Dudai, 2023: 14; see Johnson and Zimring, 2009: 314). Consequently, this thesis aims to demonstrate, drawing on Dudai (2023), how an analysis informed by historical institutionalism and the study of path dependence (Mahoney, 2000; Pierson, 2004) can provide a deeper understanding of the ADF phenomenon (its causes, development, and potential consequences) in Kansas and Wyoming.

Broadly speaking, historical institutionalism calls upon theorists to examine historical events, institutional structures, and the behaviour of social actors to answer empirical questions (Garud, Kumaraswamy and Karnøe, 2010; Steinmo, 2012). The historical-institutional approach emphasizes the importance of history (Sewell, 1996: 262-63), and scholars use it to causally relate variables that are significant in that history

(Dobusch and Kapeller, 2013; Pierson, 2004; Steinmo, 2012; Vergne and Durand, 2010). As one scholar notes, path dependence is the 'most recognizable and formalized' theory of historical institutionalism (Rubin, 2023: 266). Defined 'as a property of a stochastic process' (Vergne and Durand, 2010: 737; 755), path dependence is commonly used to explain the formation and persistence of specific institutional arrangements, as it focuses on 'issues of timing and sequence' (Pierson, 2004: 19). Yet, many researchers have observed that it does not have a clear definition (Djelic and Quack, 2007; Pierson, 2004; Rixen and Viola, 2015; Vergne and Durand, 2010).

Some scholars have suggested a three-stage model of path dependence: preformation (Phase I), formation (Phase II), and lock-in (Phase III) (see Figure 4) (e.g., Sydow, Schreyögg and Koch, 2009). Under this conceptualization, the greatest number of options exist in Phase I, and they are conditioned upon 'a historically framed or imprinted contingency' (2009: 693).[92] That is, until a 'critical juncture' (i.e., a 'disruptive' decision or event) (Onoma, 2012: 67; see also Capoccia and Kelemen, 2007) sparks 'institutional patterns or event chains that have deterministic properties' (Mahoney, 2000: 507) (Phase II). This, in turn, leads to the stabilization of a particular arrangement, or 'lock-in' (Phase III).

[92] According to Dobusch and Kapeller (2013: 292), these initial conditions are considered the most controversial component of path dependence because it is difficult to identify and measure them. However, the authors note that 'the contingent phase of path emergence and creation is always subject to historical explanation' (2013: 294).

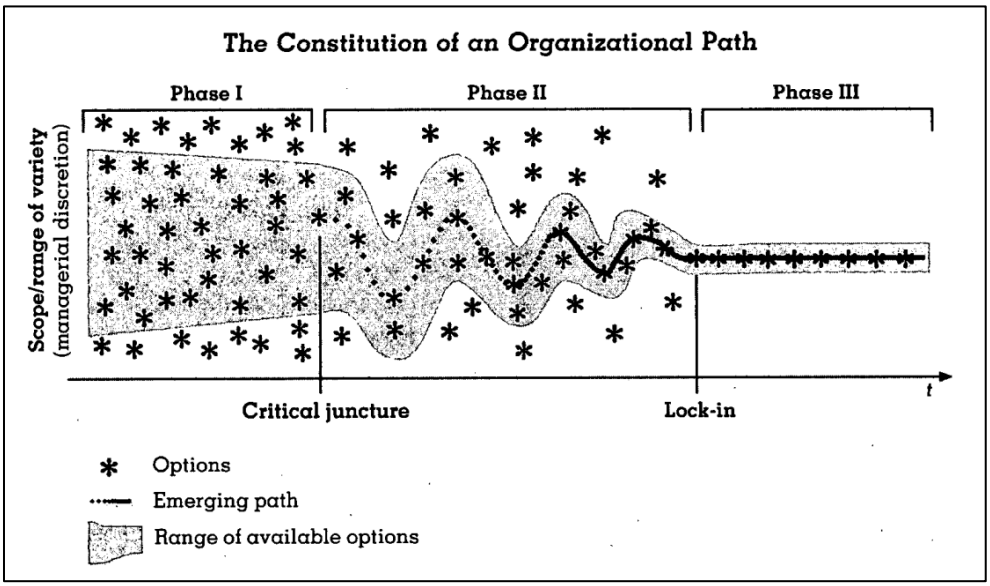


Figure 4. Sydow, Schreyögg and Koch (2009: 692) put forward path dependence as a three-phase model.

Other researchers, however, have taken a slightly different approach to analysing path dependence. Specifically, they have sought to differentiate the process of path dependence (which they argue consists of contingency and self-reinforcement) from its outcome (i.e., lock-in) (Vergne and Durand, 2010: 739; see also Pierson, 2004: 174). This view emphasizes how 'exogenous shocks' (i.e., an unexpected event that originates outside the system) (Arthur, 1994: 118) can disrupt a path dependent process that is 'locked-in', thus distinguishing path dependence from *mere* institutional persistence (Vergne and Durand, 2010: 742). The potential to disrupt lock-in is a point noticeably absent from the phase model diagram, which appears to bias historical institutionalism towards determinism (see Sydow, Schreyögg and Koch, 2009: 692).

Dudai (2023: 25) points out that path dependence scholarship is detailed and comprehensive, and as argued above, many prominent scholars have disagreed on its meaning and application. Consequently, this project has sought to bring researchers' competing theories into a cohesive whole, with a few variations in nuance. For the most

part, this approach intentionally avoids recounting internal debates in the literature[93] (see Dudai, 2023: 25) to focus on providing a theoretical framework that can be used to analyse the persistence of Kansas and Wyoming's death penalty laws in Chapter Three.

The theoretical framework proposed in this chapter (dubbed 'AIMS' for clarity, which is short for 'Analysis of Institutional Mechanisms and Structures') (see Figure 5) accepts that there are antecedent historical conditions, or multiple options available to actors (see Mahoney, 2001: 112-114) prior to a critical juncture, which many researchers view as the starting point for path dependent processes (Capoccia and Kelemen, 2007; Dudai, 2023; Mahoney, 2001; Pierson, 2004). Like the definition proposed by the phase model, AIMS considers a critical juncture as a contingent event, where 'an outcome [is] selected from two or more alternatives' (Mahoney, 2000: 513). These events 'may decide the outcome' (Arthur, 1989: 117) but exist 'outside the *ex-ante* knowledge of the observer' (Arthur, 1989: 113).[94] Critical junctures highlight the contingent nature of historical developments, where different choices could lead to different outcomes (Collier and Collier, 1991). AIMS recognizes that human agency is critical in these moments, as the decisions made by individuals (Mahoney, 2000: 514) or through collective action (Pierson, 2000: 252; 2004: 30-31) can lock in certain paths or close off others (see also Garud, Kumaraswamy and Karnøe, 2010: 762; Sydow, Schreyögg and Koch, 2009: 693). A

[93] For example, some researchers question the ability of path dependence to explain both contingency and persistence. These scholars posit a more dominate role for human agency, whereas others suggest that small, accidental events result in path emergence (Vergne and Durand, 2010: 739).
[94] Though W. Brian Arthur does not use the term 'critical juncture' in the way that political scientists and historians do, his concepts are relevant to understanding them. He emphasizes how small, contingent events and decisions can lead to significant and practically irreversible outcomes in the development of technologies, such as the QWERTY typewriter keyboard and nuclear power reactors (1989: 126-127).

governor's decision to temporarily suspend executions, for example, can set a new path that shapes future policies and practices.[95]

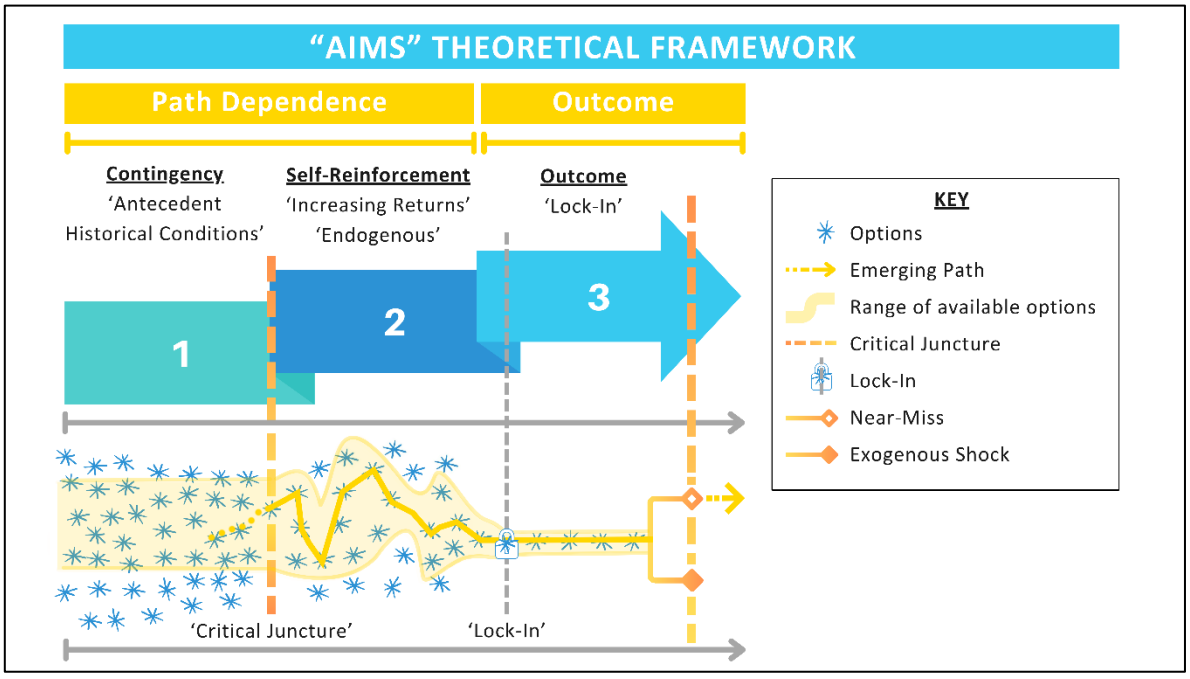


Figure 5. The AIMS theoretical framework depicts path dependence (contingency and self-reinforcement), its outcome ('lock-in'), as well as the possibility of exogenous shock (or a near-miss). Figure inspired by Mahoney (2001: 113) but created by the author as a revised and edited version of Sydow, Schreyögg and Koch (2009: 692).

According to AIMS, the second step in a path dependent process is self-reinforcement (also called 'positive feedback' or 'increasing returns'), which follows the approach of Vergne and Durand (2010). Self-reinforcement denotes how institutions reproduce, entrench, or 'reinforce' an existing process (i.e., the initial option) by creating environments that favour the status quo, making change increasingly difficult (Capoccia and Kelemen, 2007: 342; Mahoney, 2001: 114). For example, a government may develop policies and regulations that support and stabilize an existing practice (Pierson, 2004), even

[95] Historical institutionalism accepts that 'human beings are *both* norm-abiding rule followers and self-interested rational actors', which differentiates it from other social science approaches (i.e., rational choice theory and sociological institutionalism) (Steinmo, 2012: 125-126).

if that practice is not actively utilized.[96] Under this analysis, various legal and political constraints (i.e., 'negative externalities') (see North, 1990: 99; Page, 2006: 90) 'decrease the attractiveness of alternative paths' (Vergne and Durand, 2010: 743). Therefore, once an institution starts down a particular path, it becomes increasingly committed to that path, due to the cumulative advantages that arise from its ongoing use and adaptation. This is to say, self-reinforcement is the major process driver behind path dependence because it 'dynamically generate[s] inefficiency, inflexibility … and non-ergodicity' (Arthur, 1994: 15; see also Sydow, Schreyögg and Koch, 2009: 691). As such, the AIMS conception of self-reinforcement will be particularly useful in understanding ADF, a path that appears 'institutionally embedded' (see Edelenbos, Klok and Van Tatenhove, 2009).

Lastly, AIMS adopts the more moderate version of lock-in, identified by Sydow, Schreyögg and Koch (2009), to accommodate the social and political character of death penalty policy. These scholars posit that lock-in occurs in the absence of exogenous shock, when options for change have 'tapered off' (2009: 696) and 'organizational action patterns … are quasi locked in' (2009: 694). Vergne and Durand (2010: 743) add that '[l]ock-in characterizes a state of equilibrium with a very low potential for endogenous change … [it] is a hard-to-escape situation'. However, through exogenous shock, or even a combination of exogenous and endogenous factors (Rixen and Viola, 2015: 309), AIMS posits that lock-in can be disrupted, making no path dependent process completely permanent (see Djelic

[96] In addition to 'institutional embedding,' scholars have identified several endogenous factors that contribute to self-reinforcement, such as network effects (Katz and Shapiro, 1985) and learning effects (Arrow, 1962), though it is argued that institutional development is most relevant to understanding the persistence of ADF (see Pierson, 2004).

and Quack, 2007: 162).[97] AIMS also refutes the argument of some historical institutionalists 'that relying on exogenous shocks gives human beings no agency' (Steinmo, 2012: 129), since it acknowledges that reactive agency influences the ultimate impact of exogenous shocks on the stability of death penalty policies. Under this approach, a wrongful conviction may change the values or subjective beliefs of state legislators, prompting them to repeal the death penalty (a 'legitimation' explanation), or an economic crisis (such as that caused by the COVID-19 pandemic) might force states to reallocate resources in a way that makes death penalty retention unsustainable (a 'functional' explanation) (Mahoney, 2000: 521). As Pierson (2004: 52) points out (and as AIMS accepts), change is 'bounded' (i.e., locked in) 'until something erodes or swamps the mechanisms of reproduction that generate continuity'.

Having presented AIMS in detail, this chapter now shifts to examine Ron Dudai's application of historical institutionalism and path dependence to the Israeli case. Though Dudai does not present a fully developed theoretical framework in his article, his systematic application of key concepts provides clear guidance for how the AIMS framework can be used to navigate and interpret the capital punishment policies in Kansas and Wyoming. His approach also reveals how the analytical tools unique to historical institutionalism can be used to counter the progressive fallacy that helps drive contemporary abolitionist discourse about the death penalty.

[97] The modified conception of lock-in presented by AIMS differs from the 'extreme form of lock-in … found with technological solutions (e.g., the QWERTY keyboard)', where the costs of switching to a different technology can be prohibitively high (Sydow, Schreyögg and Koch, 2009: 694).

i. Dudai's Historical-Institutional Approach

Ron Dudai's decision to study Israel's 'limbo death penalty policies' (2023: 16) through the lens of historical institutionalism reflects the recognition of scholars elsewhere that understanding differences in death penalty policy over time requires tying subtle changes in public discourse to larger shifts in historically contingent political contexts and institutional arrangements (McCann and Johnson, 2009: 142; see also Garland, 2005). His approach to studying the Israeli case also illustrates *how* historical institutionalism facilitates a deeper comprehension of *why* death penalty policies become stable: using the narrative case study method and counterfactuals, Dudai focuses on 'issues of timing, sequence, and duration' (2023: 13). This methodological choice highlights the strengths and weaknesses inherent in the historical-institutional approach, which merit further exploration to understand their impact on death penalty research.

Perhaps the greatest benefit of the historical-institutional approach (and its analytical tools) is that it allows one to thoroughly investigate specific historical contexts and the sequences of events that shape institutional outcomes. Regarding the Israeli case, Dudai (2023: 13) adopts the narrative case study method and centres his analysis on three distinct time periods: (1) the early years of the state (1949 to 1954) and the legislative process, (2) the 1962 execution of Adolph Eichmann and its long-term effects, and (3) the 1967 decision regarding the death penalty in the Occupied Territories, which became entrenched in subsequent years. He starts by explaining how the actions of parliamentarians in Israel's formative period led to the death penalty being abolished for murder but reinstated for exceptional crimes (i.e., treason) (2023: 19). The 'compromising of a drive to total abolition' (2023: 17), he notes, was a consequence of politicians' reluctance to let go

of the death penalty completely, even as many considered actual executions a remote possibility (2023: 19). His clear and engaging storytelling captures this moment (a critical juncture), and others, which set Israel's death penalty on a particular course (Dudai, 2023: 19). He then highlights the contingent nature of the historical developments that followed by applying a counterfactual: (1) had there been no initial abolition for murder, other executions might have taken place leading up to the trial of Adolf Eichmann, and (2) the possibility of categorical opposition to the death penalty might have endured, since politicians might not have come to associate the death penalty with 'the uniqueness of the Holocaust' (2023: 20). Dudai (2023: 23) concludes that the persistence of Israel's 1967 death penalty policy in the Palestinian territories, and the trajectory of Israel's death penalty more broadly, were not predetermined outcomes, and that different choices could have led to different results (2023: 23).

While some have raised the concern that historical institutionalism might skew too much toward determinism (e.g., Thelen, 1999: 385), Dudai avoids this pitfall by using *both* the narrative case study method and counterfactual analysis. With these tools, he (1) considered multiple causal factors (see Fearon, 1997) in attempting to understand Israel's unique form of death penalty retention, and (2) acknowledged the contingency of the outcome of the political and legislative processes, which he posits were not the result of 'a calculated decision and broad agreement' (2023: 16). Yet, his focus on providing a detailed, contextual, and chronological account of the Israeli case arguably makes it difficult to generalize his findings or apply them to different contexts, such as that of Kansas and Wyoming. However, it is argued that a comparative analysis of multiple cases could remedy this issue, since examining multiple instances of ADF (and their various contexts)

would allow researchers to draw more generalizable conclusions about the forms (i.e., intentional or inertial) of the retentionist phenomenon overall. Similarly, counterfactuals can be used to broaden the generalizability of Dudai's findings by highlighting how similar factors might produce different outcomes in different settings.

Perhaps most importantly, Dudai's analysis of the Israeli case counters the progressive fallacy that pervades abolitionist discourse, which he defined in a more recent journal article (see Dudai, 2024). According to Dudai (2024: 140-141), the progressive fallacy constitutes the teleological belief that the death penalty will eventually end, and that its current existence is 'a barbaric anachronism in the "civilized" modern world' (see also Council of Europe, 2013; Hood, 2014: 286).[98] His cogent analysis of the persistence of Israel's death penalty policies challenges this teleological perception: he identifies several 'near-misses' (i.e., occasions when change was feasible and contemplated, but ultimately dismissed) (Capoccia and Kelemen, 2007) which had the effect of stabilizing Israel's death penalty (2023: 22). For example, Dudai (2023: 22) notes that the decision to impose death on a Palestinian suicide bomber in 1994 was eventually overturned on appeal (and the defendant was resentenced to life imprisonment) when the political establishment and military leaders expressed concern about the conviction. This showcases how capital punishment is unlikely to follow any moral or political teleology (see Meranze 2011: 73-74), and how the 'limbo' situation may in fact be attractive to some politicians: Israeli parliamentarians wish to retain the death penalty as 'a condensed symbol of populist defiance of the establishment and the pragmatic ethos' (2023: 23) and avoid executions for

[98] The United Nation's early reports on the death penalty in the 1960s advanced the progressive fallacy (see generally Ancel, 1968).

humanitarian reasons (Dudai, 2023: 24). This is to say, the progressive fallacy completely overlooks how symbolic measures might be 'effective' actions rather than 'empty gestures or mere talk' (Garland, 2010: 20). ADF may be the real anachronism, Dudai (2024: 143) notes, given its *form* of retention (i.e., symbolic retention) in the face of other policies that result in violence and human rights abuses.

Much like Dudai (2023: 13), this thesis will use the case studies in Chapter Three to 'complicate the common narrative portraying an inevitable, quick-paced, trajectory from restricting death sentences to *de facto* abolition to eventual formal abolition' (see also, Hood and Hoyle, 2015: 13-14; Zimring and Hawkins, 1986: 8-12). Dudai's (2023) analysis of Israel exemplifies how the historical-institutional approach and path dependence can be used to make stability 'the object of inquiry' (2023: 13), which is critical to the investigation of ADF cases. As this project will develop, the 'deeply contingent' nature of death penalty practices in Kansas and Wyoming has likely promulgated the 'entrenchment of a "limbo" arrangement' (Dudai, 2023: 11), as opposed to 'decisive constitutional abolition' (Steiker, 2012: 780; see also McGowen, 2011: 123-124). However, as this project now shifts to examine, the theoretical framework proposed in Part A ('AIMS') could be further improved were it to consider how politics and the broader, hierarchical design of the American legal system (i.e., federalism) affect death penalty retention in individual states.

B. Assessing Stability in the US Federal System

As discussed above, Ron Dudai's case study on ADF is one of the few available today (see Dudai, 2023), but because it was conducted within the framework of Israel's parliamentary democracy, there is a need for further research on ADF, especially in the

context of federal (as opposed to unitary) systems of government.[99] Unlike Israel, the US is committed to a 'radical' form of federalism (Garland, 2010), where executive, legislative, and judicial powers are 'bundled' at each governmental tier, and there is a pronounced inter-institutional division of powers (see Broschek, 2013: 103) between the state, local, and federal levels.[100] Consequently, ADF is much more likely to be influenced by the structure of government in the US than in Israel. Several scholars have observed that the lack of a centralized political system in the US has been a significant barrier to *de jure* abolition (Berry III, 2011: 1020; Rice, 2020: 39), since US political leaders cannot (and will not) play the same role as their European (or Israeli) counterparts in bringing about abolition (Bandes, 2008: 22; Berry III, 2011: 1015-1016; Fleury-Steiner, Dunn and Fleury-Steiner, 2009: 10; Hammel, 2011: 203). It follows then that a theoretical framework that considers the structural dynamics of the US political system and its legal institutions, as well as the underlying federal constitution (i.e., 'federalism'), can help researchers understand the causes and persistence of ADF, as well as its relation to abolition, in Kansas and Wyoming. The only challenges are (1) identifying which institutions within the federal framework to prioritize and (2) adapting AIMS to interpret the self-reinforcing interactions between these institutions.

As to the first point, the US Constitution plays an important role in determining which institutions are the most influential in path development and maintenance. Under the federalist framework (where powers are divided between the federal government and the

[99] Israel has a unitary structure of governance where the central government (i.e., the Knesset and Prime Minister) holds the primary power, and local governments function primarily as administrative arms of the central authority (State of Israel, 2014).

[100] In the US, all state government structures mirror the three-branch model of the federal government, but this is not a requirement of the US Constitution (The White House, 2024; see also U.S. CONST. art. 1-3).

state governments), the US Constitution grants the US Supreme Court the authority to (1) regulate the imposition of the death penalty and (2) the power to review state supreme court decisions when state laws or constitutions conflict with federal constitutional law.[101] Additionally, it (3) grants state legislatures the authority to enact state laws concerning the death penalty,[102] and (4) empowers local constituencies to manage criminal justice (more specifically, prosecutors at the county level decide whether to seek the death penalty on behalf of the state) (see Donovan, 2022; Pishko, 2016; Smith, 2015). Accordingly, Chapter Three will treat these institutions as potentially open systems in the double sense that they interact with each other while being embedded or nested within the federal institutional structure (see Djelic and Quack, 2007: 167), illustrating how federalism creates a multifaceted landscape in which legal precedents, political pressures, and local decisions collectively determine the trajectory of death penalty practices in the US.

Regarding the second point, the concept of 'coevolutionary lock-in' (see Burgelman, 2002) can be added to the AIMS theoretical framework to assess how the US Supreme Court, state legislatures, state supreme courts, and locally elected prosecutors interact within the federal structure to influence the persistence and evolution of the death penalty in Kansas and Wyoming. Social scientists and historians acknowledge that a path can emerge from the interplay of various mechanisms (Dobusch and Schüssle, 2013; Page, 2006), and in the death penalty context, coevolutionary lock-in can be defined as:

> The dynamic interplay between federal and state legal frameworks, political institutions, and administrative practices that creates a self-reinforcing mechanism, leading to the sustained retention of the death penalty, where structural and institutional dependencies solidify the status quo (see Burgelman, 2002: 326).

[101] U.S. CONST. art. 3, § 2, cl. 2.
[102] *See* U.S. CONST. amend. X.

Such a definition is useful in understanding how certain states become 'locked in' to retaining the death penalty because it posits 'federalism … as a *multilayered regime*' where institutional interactions consistently reinforce 'power relations' and the decisions of 'constellations of actors' (Benz and Broschek, 2013: 5). Chapter Three's case studies, discussed next, will examine how institutional interactions create a resilient framework for the death penalty, demonstrating how coevolutionary lock-in maintains the status quo. This analysis will highlight federalism's intricate influence on the persistence and evolution of the death penalty, offering a comprehensive understanding of how institutional dynamics have entrenched capital punishment policies in Kansas and Wyoming.

Chapter Three: Comparing Kansas and Wyoming

Since 1976, Kansas and Wyoming have sentenced 15 and 12 individuals to death, respectively (Death Penalty Information Center, 2022c). Of these prisoners, 9 remain on death row in Kansas and none in Wyoming. Additionally, Kansas has conducted zero executions, while Wyoming has carried out only one (see Tables 3 and 4). These statistics have led one author to describe Kansas and Wyoming as 'inactive' death penalty states (Lofquist, 2002: 1520), and it appears that several cultural, legal, and political factors have contributed to the emergence and persistence of ADF. To address each of these points, this chapter will be divided into several parts.

First, this chapter will outline the antecedent historical conditions that have fuelled the death penalty's survival in Kansas and Wyoming. Drawing on conversations with various interviewees, it is argued that a 'cowboy culture' (i.e., the violent and retributive, honour-based culture that emerged from the interplay of lynching, gun ownership, and self-defence) informs the retributive nature of present-day death penalty discourse in Kansas

and Wyoming. It is noted that race and class have impacted this culture, influencing who is deemed worthy of execution, both in the past and the present. As will be explored in Part B, this cowboy culture helped determine the outcome of critical junctures in each state, namely: (1) the 1994 reinstatement of the death penalty in Kansas by Democratic Governor Joan Finney, and (2) Mark Hopkinson's 1979 case in Wyoming, which saw the appointment of Gerry Spence as a special prosecutor.

Lastly, Part C will describe how the self-reinforcing nature of 'local legal cultures' (Baumgartner, 2011; Baumgartner and Gram, 2015) in Kansas and Wyoming has been challenged by federal and state courts, bringing attention to the issues of cost and race. This section will briefly describe select 'near-miss' events that have reinforced ADF, specifically: (1) efforts to repeal the death penalty in the state legislatures, and (2) the decision of the US Supreme Court to reinstate Kansas's capital statute in *Kansas v. Marsh*.

***Table 3*. Capital murder convictions in Kansas where the defendant received the death penalty, 1994-2024.**

Table prepared by the author using data from the Kansas Department of Corrections (Burghart, 2023; Fins, 2023: 49) the Death Penalty Information Center (2022b), and expert testimony in *Kansas v. Young* (Baumgartner, 2022; Fagan, 2022: 14).

Kansas Death Sentences (1994-2024)						
First Name	**Surname**	**County**	**Race**	**Offense Date**	**Sentence Date**	**Current Status**
Michael	MARSH	Sedgwick	W	6/17/1996	4/16/1998	Resentenced to Life
Gavin	SCOTT	Sedgwick	W	9/13/1996	8/12/1999	Resentenced to Life
Stanley	ELMS	Sedgwick	W	5/4/1998	2/10/2000	Resentenced to Life
Johnathan Daniel	CARR	Sedgwick	B	12/15/2000	11/15/2002	Death Row
Reginald Dexter	CARR	Sedgwick	B	12/15/2000	11/15/2002	Death Row
John Edward	ROBINSON	Johnson	W	Various	1/21/2003	Death Row
Douglas Stephen	BELT	Sedgwick	W	6/24/2002	11/17/2004	Died, not executed
Phillip	CHEATHAM	Shawnee	B	12/13/2003	2005	Resentenced to Life
Sidney John	GLEASON	Barton	B	2/21/2004	8/28/2006	Death Row
Scott Denver	CHEEVER	Greenwood	W	1/19/2005	1/23/2008	Death Row
Gary Wayne	KLEYPAS	Crawford	W	3/30/1996	1998; 12/3/2008	Death Row
Justin Eugene	THURBER	Cowley	W	1/5/2007	3/20/2009	Death Row
James Kraig	KAHLER	Osage	W	11/28/2009	10/11/2011	Death Row
Frazier Glenn	CROSS	Johnson	W	4/13/2014	11/10/2015	Died, not executed
Kyle Trevor	FLACK	Franklin	W	4/28/2013	5/18/2016	Death Row

***Table 4*. Capital murder convictions in Wyoming where the defendant received the death penalty, 1972-2024.**
Table created by the author using data compiled from the Wyoming Department of Corrections (2023), newspaper articles (AP News, 1975; 1987) and the Death Penalty Information Center (2022b; 2022c).

Wyoming Death Sentences (1972-2024)						
First Name	**Surname**	**County**	**Race**	**Offense Date**	**Death Sentence Date**	**Current Status**
Billy James	CLOMAN	Laramie	B	12/27/1973	8/10/1974	Resentenced to Life
Jerry Lee	JENKINS	Natrona	W	9/24/1973	5/1/1974	Died, not executed
Ronald Leroy	KENNEDY	Natrona	W	9/24/1973	5/1/1974	Resentenced Life Sentence
Julian Pernell	TURNER	Laramie	B	12/27/1973	8/10/1974	Died, not executed
Jose	FLORES	Carbon	Latinx	3/4/1975	1976	Resentenced to Life
Mark Allen	HOPKINSON	Unita	W	5/18/1979	1979; 1982	Executed (1992)
Roy Lee	ENGBERG	Natrona	W	12/22/1981	12/20/1982	Died, not executed
Kevin Winston	OSBORN	Uinta	W	5/14/1982	1982	Resentenced to Life
Donald Lee	BENSON	Laramie	W	7/31/1986	5/6/1987	Died, not executed
Martin J.	OLSEN	Washakie	W	1/20/1997	1997	Resentenced to Life
James Martin	HARLOW	Carbon	W	6/26/1997	11/5/1998	Resentenced to Life
Dale Wayne	EATON	Natrona	W	3/25/1988	6/3/2004	Resentenced to Life

A. Antecedent Historical Conditions

The early cultural forces that established Wyoming as the ‘Cowboy State’ (see Knobloch, 2001; Nicholas, 2001: 1) and Kansas as the ‘Free State’ (see S. L. Alexander, 2022: 2; O’Brien, 2006: 93) have had an indelible effect on the reinstatement and the persistence of the death penalty in the modern era. In the mid-1800s, land in Kansas, and especially in Wyoming, was (and continues to be) sparsely populated (Helmsing, 2017: 297; Knobloch, 2001: 217), and consequently, the challenges of maintaining law and order in these vast, isolated areas often necessitated severe measures to deter crime (Berg, 2011;

Pfeifer, 2013; Taylor *et al.*, 2017). The first section will discuss how (1) lynching was often (but not always) used as a tool for self-governance (Dray, 2003), and (2) 'state formation processes' compelled widespread gun ownership to protect oneself from perceived threats (Garland, 2010). This frontier mentality of violence, coupled with Kansans' and Wyomingites' cultural emphasis on honour and retribution against (alleged) evildoers, has shaped societal attitudes towards justice and punishment that helped established, and now perpetuates, ADF in these states. Moreover, historical events concerning race and class have helped determine who receives a death sentence in Kansas and Wyoming.

i. Lynching and Gun Ownership

Seguin and Rigby (2019) describe the 'Wild West regime' as the lynching of white people in areas with limited state control that declined as state law enforcement became more widespread (see also Pfeifer, 2011; Wells, 1909; Yost, 1993: 192). Distinct from the Southern 'slavery regime' that sought to enforce a racial hierarchy with the lynching of blacks, the Wild West regime was centred on confronting offences against property, which jeoparded individuals' survival as they built states in the harsh conditions of the frontier.[103] In the mid-1880s, horse thieves in Kansas were frequently and severely punished, often with lynching, and in Wyoming, cattle thieves were treated with similar impunity (see Figures 6 and 7) (Berg, 2011; Brown, 1991; see also Moore, 2014: 33-34). Murderers, however, were frequently found to have acted with justification. As one author explains, 'it was more honorable to kill than to steal in some circumstances, particularly if it involved theft of livestock' (Moore, 2014: 33), since horses and cattle were critical to the livelihood

[103] Lynching *outside* of the South differed from lynching *within* the South, largely in relation to the cultural and historical distinctions driven 'by the legacy of antebellum racial slavery' (Pfeifer, 2013: 4).

of settlers and the economic stability of the fledgling territories (Hine and Faragher, 2000). To this end, gun ownership was paramount to the 'creation myth' described by Lifton and Mitchell (2002: 238), in which 'rogues,' 'adventurers,' 'Indian fighters,' 'missionaries,' and 'hunters' killed and were killed until they had triumphed over the frontier.[104] 'Evil was to be eliminated by killing' (2002: 239), and in meting out such a remorseless brand of 'rough justice' (Pfeifer, 2013), the gun was used to establish and safeguard the notion of a just society put forward by Kansans and Wyomingites. 'That toughness, guns, and violence appal liberal elites elsewhere is, of course, part of their local appeal' in the Midwest and West today, explains Garland (2010: 180-181). In a recent interview with this author, defence attorney Terry Harris elaborated on this enduring aspect of Wyoming culture, and its connection to perceptions of safety:

> The people in Wyoming are all about [the] open carry [of guns]. Anybody should be able to carry–concealed or open, it doesn't matter–anybody and everybody should be able to do it. And it will make us "*safer*." Just this legislative session, our governor vetoed a bill [HB 125] that was passed to repeal the [school and local government] zones where you can't carry. (Harris, 2024)

As Harris (2024) identifies, Governor Mark Gordon vetoed a bill restricting local firearms regulation in March 2024. In a letter addressed to the secretary of state, the governor argued that the law 'erodes historic local control norms by giving sole authority to the Legislature to micromanage a constitutionally protected right' (Gordon, 2024). His remarks reflect the deeply ingrained value of self-governance within Wyoming culture and highlight Wyomingites' persistent belief in the right to self-defence, a key element influencing the state's retention of the death penalty. Some scholars contend that 'in [the] continuing

[104] In a study of violence, masculinity, and the cowboy image in Texas, Moore (2014: 35) argues that gun ownership signalled manhood, which was directly correlated with honour and violence: 'honor was … a major part of masculinity; and honor necessitated violence'.

crusade to destroy or "murder" evil', the death penalty has become '[the] ultimate weapon' of ownership over death (Lifton and Mitchell, 2002: 238-239).

The geographic sparseness of Kansas and Wyoming further reinforces the association between a 'cowboy culture' and the contemporary endorsement of capital punishment as a means of maintaining order and justice. In such vast, open landscapes, law enforcement remains limited outside of major cities, mirroring the dynamics that early settlers faced and fostering a culture where self-reliance and personal protection are paramount. Karen Leve, a staff attorney for the American Civil Liberties Union in Kansas, reflected on the connection between self-defence, retribution, and support for the death penalty in Kansas in a recent interview with this author:

> I live in the [Kansas City metropolitan area], so it doesn't feel all that different from big cities but, you go west an hour and you're in cowboy country. It's not far to get into … the "wild," to be out there around farms and nothing else and be the only person out there. There is, I think, this belief–whether it's empirically proven or not–that the death penalty is a deterrent and a tool that can aid prosecutors, even if they don't intend to use it, to show that they are serious about crime in their jurisdictions, by being able to say they're going to charge [individuals] with the death penalty. (Leve, 2024)

Leve's remarks illustrate how the reliance on capital punishment, as both a symbol and a practical measure, reflects the enduring frontier mentality that values individual autonomy and swift, decisive justice in the face of threats to community safety and stability. While some authors have taken issue with purely cultural accounts to explain the persistence of the modern death penalty (e.g., Berry III, 2008; Garland, 2010), it is argued that this 'cowboy culture' of violence, rugged self-governance, honour, and retribution is at least tangentially related to how ADF has become a defining feature of the Kansas and Wyoming legal landscapes (see Zimring, 2005: 378-379). Indeed, in assessing death penalty retention in Missouri, one journalist recently argued that the divide between retentionists in their use

of the death penalty has to do with history (Gabbatt, 2024). Moreover, as will be discussed next, it is possible that early historical events, sparked by class and racial tensions, have influenced perceptions of who constitutes a 'good' or 'bad' citizen worthy of capital sentencing in the modern death penalty era.

ii. The Emergence of Class and Race Distinctions

Perhaps the most dangerous consequence of frontier violence for the modern death penalty was its investment in punishing 'the other', which can be traced back to a divergence in attitudes over sufficient justifications for violence. This is to say, 'rough justice' was grounded in the local prerogatives of honour, vigilantism, and gun reverence just as much as it was in race, class, and gender by the end of the Wild West regime. While the portrait of the 'other' has changed over the years, two sets of histories evince the development of this dynamic well: (1) the Johnson County War (1889-1893), a comprehensive campaign launched by affluent cattle owners against homesteaders and small ranchers to assert their control over the Wyoming range (Barrasso, 2022; Berg, 2011: 141), and (2) the fervour of Reconstruction-Era racism in Kansas, which emerged from the pre-Civil War sectional tensions regarding slavery (Campney, 2013: 81).

In Wyoming, clashes between 'the landed against the landless or marginal landholders' (Pfeifer, 2004: 15) swiftly redefined the category of individuals deemed deserving of lynching, substituting socioeconomic status (and other variables, such as gender) for honour in lynching apologetics. Prominent cattlemen desired control over valuable natural resources, particularly water, coal, and land (Nicholas, 2001: 39), and this resulted in the summary execution of individuals who 'antagonized the wealthy cattlemen' (Berg, 2011: 141). During this 'Western Civil War of Incorporation' (Brown, 1991: 46),

alleged cattle thieving prompted the execution of Ellen Watson (a.k.a. 'Cattle Kate') and her partner, James Averell, by members of the Wyoming Stockgrowers Association (Pryor and Jones, 2023). Averell and Watson had written to local authorities about the encroachment of the cattlemen on their homesteaded lands, and they believed that their involvement in politics would protect them against the cattle barons who sought to exert their dominance over the range (K. Alexander, 2022). Nonetheless, the couple was hanged, and Watson, being a woman, was 'denounced … as a prostitute who reputedly accepted stolen cattle as payment for her services' (Berg, 2011: 66). Averell's half-brother condemned the lynching 'as a cruel, cold-blooded murder' (Cahill, 1889: 12), but it is unclear whether he ever succeeded in bringing the perpetrators to justice (before a jury). While the intervention of the US Cavalry eventually put an end to the Johnson County War (Thuermer Jr., 2018), the lengths to which the powerful were willing to go to protect their interests were clear (see Davis, 2010). It is likely that this set of historical events has shaped cultural perceptions of how Wyomingites ought to respond to threats to survival and prosperity (Zimring, 2005: 378),[105] but also the importance of due-process safeguards to protect the rights of defendants (Pfeifer, 2004: 15). This is especially relevant to understanding the outcome of the 1979 case of Mark Hopkinson and its impact on ADF in Wyoming, as will be described in Part B.

Similarly, contemporary perceptions about which Kansans are worthy of receiving the death penalty–and the need *for* the death penalty–are likely driven by the antiblack violence that emerged in Kansas in the 1860s and 1870s following 'Bleeding Kansas'

[105] Zimring (2005: 378) argues that '[c]ultural attachment to the death penalty in parts of the South and the West would be expected to prolong the argument about capital punishment and make the issue more visible than European precedent.'

(1854-1859), a conflict over whether Kansas would be admitted to the Union as a free or slave state (Berg, 2011). During this border war between Kansas and Missouri, fears about the growing Black population and miscegenation drove much of the violence, and pro-slavery forces 'called for meting out popular justice against abolitionists and "slave stealers"' (Berg, 2011: 43). As one historian observes, 'the slavery agitation [in the 1860s] made the difference between a lynching and a legal hanging quite often a matter of personal opinion and party affiliation' in Kansas (Yost, 1993: 185). In prevailing, the abolitionists ratified the Wyandotte Constitution, prohibiting slavery, and declared Kansas 'the Free State' (O'Brien, 2006: 93). However, the state's bloody history ensured that, despite the legal end of slavery, the struggle for true freedom and equality for Black Kansans would continue. Lynchings and other forms of extrajudicial punishment against Black Kansans became part of a broader strategy to intimidate and oppress the Black community in the years following Bleeding Kansas, preventing them from achieving economic, social, and political parity with whites (S. L. Alexander, 2022: 33-34; Campney, 2013: 84-88). When horse stealing was eliminated as an offense worthy of death in 1877, rape became the leading cause of lynching after murder in Kansas, and brought in 'the race problem', as black Kansans suddenly outnumbered white Kansans by 4 to 1 (see Table 5) (Yost, 1933: 199). Unlike their southern counterparts, however, many Kansans were horrified by these acts of racial violence (Campney, 2013). In particular, the lynching of Fred Alexander, a Black man in Leavenworth, for the alleged rape of a white woman in 1901 prompted legislators to '[consider] pushing Leavenworth County out of the state and into Missouri' (Nelson, 2023). In acknowledging such incidents of racial hostility, Kansans 'depicted [them] … as external contaminants, [an] inherently "southern" phenomena not indigenous

to their state' (Campney, 2013: 89), implying a unique history that 'embraces ... the concern that race and class could influence the decision to impose the death penalty' (O'Brien, 2006: 93).

Table 5. Kansas Lynchings by Offence, 1850 to 1930.[106]
Table created by author using data from the Kansas Historical Quarterly (Yost, 1933: 192).

	1850	1860	1870	1880	1890	1900	1910	1920	1930
Horse stealing	13	54	26	0	0	0	0	0	0
Cattle stealing	1	1	0	0	0	0	0	0	0
Murder	2	23	13	21	14	3	1	0	0
Rape	0	7	0	3	2	0	1	1	1
Robbery	2	7	0	4	0	0	0	0	0
Border warfare	2	0	0	0	0	0	0	0	0
Misc & Unknown	1	2	0	1	0	0	0	0	0
Total	***21***	***94***	***39***	***29***	***16***	***3***	***2***	***1***	***1***

It appears then that death penalty retention in Kansas and Wyoming is rooted in issues of 'potency and security' (Zimring and Hawkins, 1986: 150), especially in the face of 'the other', who may be differentiated from the governing majority on the basis of class, race, or both. 'To the extent that anger about crime is rooted in insecurities about the state of society or the moral order, support for the death penalty is both value expressive and a matter of principle', argue Kort-Butler and Ray (2019: 487). This perspective suggests that support for capital punishment in Kansas and Wyoming is not just about crime deterrence, but perhaps reflects deeper cultural anxieties that, in turn, translate into a desire for, but an ambivalence about using, the death penalty. In a recent interview, Professor Sean D.

[106] The difficulty of confirming lynching events has resulted in radically different productions of lynching data (e.g., NAACP, 1922; Pfeifer 2013; Seguin and Rigby, 2019; Tolnay and Beck, 1995). Figures 6 and 7 are based on data from the most contemporary account of lynching statistics (i.e., Seguin and Rigby, 2019) and appear more conservative than Table 5.

O'Brien elaborated upon the differences that separate Kansas and Wyoming from the active retentionist states in the South:

> Kansas and Wyoming are conservative in a different way than southern states are conservative. … Every city has a street named Lincoln, or they have a monument to Abraham Lincoln, right. Where would you find that in the South? When you're talking about the relationship between conservatism and the death penalty, or between the death penalty and lynching, and the death penalty and slavery and the death penalty and Jim Crow, you'll find a much stronger connection between the death penalty, lynching and Jim Crow. That's what's missing in both Kansas and Wyoming. … Understanding the history of these places is really important to understanding where they are today on the death penalty. (O'Brien, 2024)

As Professor O'Brien sets out, the nuanced conservatism in Kansas and Wyoming, founded upon a 'cowboy culture' that developed from challenges associated with maintaining law and order, contrasts with the capital punishment systems found in the South. While Southern states may see the death penalty as a continuation of historically punitive traditions centred about race, Kansas and Wyoming's usage of the death penalty is more conflicted, influenced by a legacy of moral reform but also a history of lynching (which some argue predicts modern death penalty use) (Baumgartner, Caron and Duxbury, 2023: 47). Having described the historical events that clarify the support for capital punishment in Kansas and Wyoming, this paper now turns to Part B, which will outline the more direct elements that set ADF into motion, namely: (1) the 1994 decision by Governor Joan Finney to reinstate the death penalty in Kansas, and (2) the 1979 case of Mark Hopkinson in Wyoming.

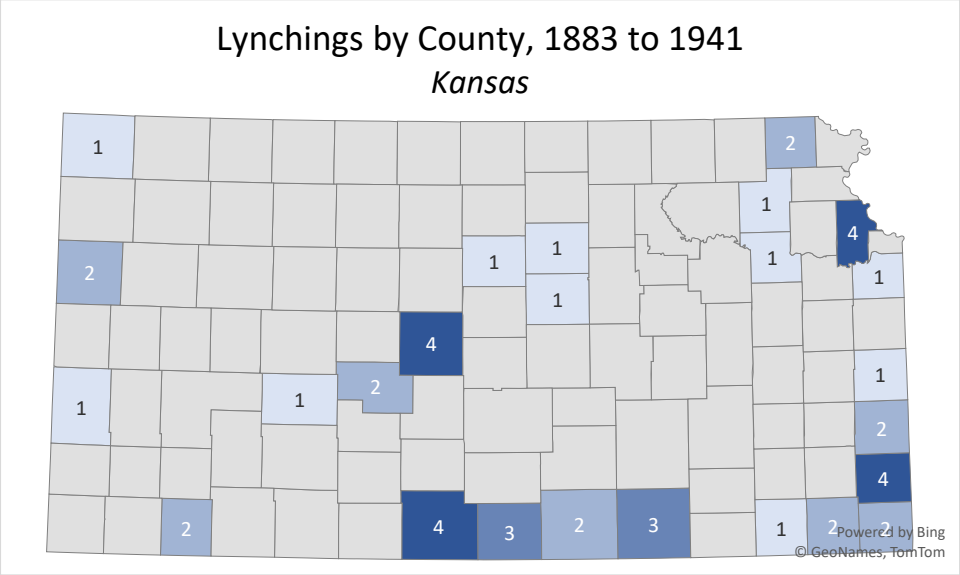


Figure 6. Lynchings in Kansas by county, 1883 to 1941. Chart created by the author using data compiled by Rigby (2019).

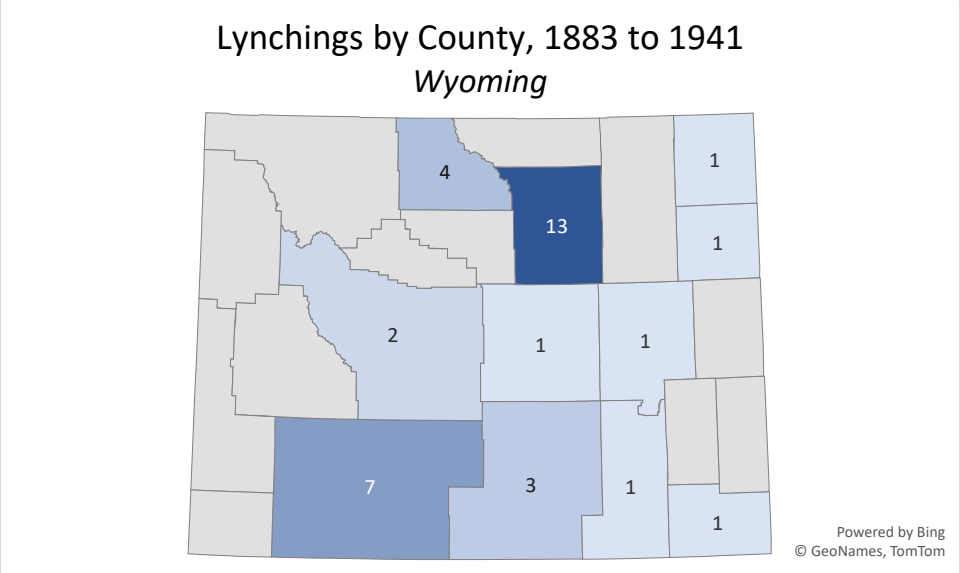


Figure 7. Lynchings in Wyoming by county, 1883 to 1941. Chart created by the author using data compiled by Rigby (2019).

B. Critical Junctures in Kansas and Wyoming

There are two events that stand out as the critical junctures that sparked ADF in Kansas and Wyoming: (1) Governor Joan Finney's 1994 decision to reinstate the death penalty in Kansas, and (2) the 1979 trial of Mark Hopkinson. These events were contingent and could have resulted in different outcomes had certain elements been different,

particularly the murder of Stephanie Schmidt and the appointment of Gerry Spence as a special prosecutor.

i. Governor Finney's Decision to Reinstate Death

Between 1976 and 1994, Kansas saw nearly fifty attempts in the state legislature to revive the death penalty (Galliher and Galliher, 1997: 380) and the state was the last to reinstate capital punishment in the nation (O'Brien, 2024). Unlike her predecessors, Governor Joan Finney did not veto the death penalty legislation when it came to her desk but allowed a revised death penalty statute to go into effect without her signature in 1994 (see Figure 8). This was a surprising move for a governor who had testified against the bill earlier in the legislative session (Marion, 2024), but an understandable one considering the pressure she faced to respond to the murder of Stephanie Schmidt, a 19-year-old white woman, in an affluent Kansas City suburb (Galliher and Galliher, 1997: 373-76; Nelson, 2023). In a recent interview with this author, an expert on the Kansas death penalty explained the variety of forces that Finney confronted when faced with the death penalty bill:

> When the bill was on her desk, [there were] people conducting a fast outside of her office, there were people politically connected, reaching out to her privately behind the scenes making last minute appeals, [there is] all this stuff happening. And she felt she had to uphold that promise that she had made [during her gubernatorial campaign] … There was a public perception that crime was getting worse. You had the Stephanie Schmidt case; you have the Fairchilds testifying. And so there was all of this, "crime is rising, crime is rising, gotta do something" stuff. (Marion, 2024)[107]

Marion's testimony reflects how fear about rising crime rates and a particularly heinous murder pushed Governor Finney to let the death penalty legislation go into effect without her signature. Her refusal to sign the bill is a unique reflection of Kansans' historical

[107] This interviewee's name has been replaced with a pseudonym.

ambivalence to the death penalty, but her decision to let it pass anyway evinces the lawmakers' desires to 'get tough on crime' in the face of the retributive desires of the public (Galliher *et al.*, 2002: 68). Nonetheless, it is possible that she might have acted differently, especially if Schmidt's murder had not happened (or happened when it did). Scholars explain that it was unlikely that a death penalty bill would have become law during or after Governor Finney's term in office, since both of her predecessors, strong advocates of capital punishment, (1) had failed to persuade the legislature to submit a bill for the governor's signature and (2) lost elections to liberal Democrats who openly opposed capital punishment (Galliher *et al.*, 2002: 68).

By allowing the death penalty law to go into effect, however, the governor's decision arguably initiated ADF, since Kansans' normative ambivalence toward capital punishment was resolved by passing a death penalty bill, 'but [by] passing one that might never be used' (Galliher and Galliher, 1997: 371). The death penalty law was severely limited in scope, the result of several compromises between lawmakers, which meant that it would only ever apply to a select few defendants in murder cases (Marion, 2024). However, 'the law still defines the moral or cultural boundaries of the state' (Galliher and Galliher, 1997: 352), and has since left the death penalty 'a non-issue' for Kansans, whose retributive demands had been met with the passage of the law (Koch, Wark and Galliher, 2012: 70).



STATE OF KANSAS

OFFICE OF THE GOVERNOR

JOAN FINNEY, *Governor*
State Capitol, 2nd Floor
Topeka, KS 66612-1590

913-296-3232
1-800-432-2487
TDD# 1-800-992-0152
FAX# (913) 296-7973

April 22, 1994

Message to the House of Representatives of the State of Kansas:

Today I am keeping the promise I made to the people of Kansas when they elected me.

I promised that I would not play a political game with this very serious issue. I am personally opposed to the death penalty, but believe that a majority of Kansans support it as a matter of public policy.

I promised that if the Legislature passed a bill, I would allow it to become law without my signature.

I refuse to sign House Bill 2578, thereby allowing it to become law on this date.

Joan Finney, Governor

April 22, 1994
Date

Figure 8. The governor reinstates the death penalty in Kansas. Image modified by the author from Finney (1994).

ii. The Prosecution of Mark Hopkinson

Unlike Governor Finney's decision to reinstate a narrowly defined death penalty, the consequences of Mark Hopkinson's 1979 case for ADF are less clear at first; that is, until one explores the impact that Gerry Spence had as the special prosecutor in his case. Hopkinson's capital charge came just two years after the state had reinstated its death penalty with little fanfare in 1977 (McCall, 1978: 894-897). Hopkinson had been convicted and sentenced to life imprisonment for his involvement in multiple murders, including orchestrating the 1977 bombing that killed Vincent Vehar, Vehar's wife, and their son, but he received the death penalty for arranging the killing of one of his accomplices, Jeff

Green.[108] As one appellate judge wrote, the facts of Hopkinson's case 'present one of the most bizarre stories in the judicial history of the State of Wyoming'.[109]

Hopkinson's trouble with Vincent Vehar arose over a dispute with another family, the Roitzes, about water rights. Vehar represented the Roitzes when they sued Hopkinson's father for covering up a ditch carrying water to their property, a decisive action in the isolated community of Bridger Valley.[110] Tensions were further exacerbated when Hopkinson's father approached the Fort Bridger Sewer and Water Board, a client of Vehar, to see if he could get his proposed trailer court annexed to the sewer district. A contract was signed, but the typical hookup fee (a total of $100) had been raised to $300 per trailer, which led Hopkinson to threaten Vehar and members of the Board when they forced him to meet the terms of the contract.[111]

The eventual deaths of Vehar and others over land and water rights resulted in a trial that pitted famed trial lawyer Gerry Spence against Mark Hopkinson (Spangler and Jacobsen-Wells, 1990). Wyoming features an unusual law that allows for the appointment of special prosecutors,[112] and Spence's appointment to prosecute Hopkinson arguably secured his conviction and ensured that the death penalty would be carried out in his case. More specifically, Spence delivered a closing argument based on community survival, stirring jury members' fears about Hopkinson's future dangerousness:

> [L]adies and gentlemen, every society in the world from our tribal beginnings have had the right to kill our enemies so that we can survive. We have the right to survive. … It belongs to you[,] and it belongs to me. … The people in Bridger Valley have similar rights. … And I want you to hear me say to you that I am not talking now about Mark Hopkinson. I am talking about the very basic underlying

[108] *Hopkinson v. State*, 632 P.2d 79, 97 (Wyo. 1981).
[109] *Id.* at 94.
[110] *United States v. Hopkinson*, 631 F.2d 665, 667 (10th Cir. 1980).
[111] *Hopkinson*, 632 P.2d at 93-94.
[112] Wyo. Stat. § 18-3-302 (2022).

> right of an entire society to survive … and if people don't have the courage to protect it, then we have no right to survive. … to me, for Gerry Spence, killing for punishment is different from killing to survive. … If [Hopkinson's] in prison for a lifetime he has … an opportunity to arrange murders as you have found he has done in this case. … He has already shown you he will do that.[113]

Spence's line of argument evoked the cultural heritage of Wyoming, where survival has been a consistent theme throughout state history, and it was even upheld on appeal by judges who found the reasoning 'hard, but … consistent with … protecting society from a dangerous and unrestrainable threat'.[114] Consequently, the Hopkinson case established a 'stabilising legacy of the exceptional' (Dudai, 2023: 20) in the sense that Wyomingites are less likely to impose death in cases with less complex circumstances. Since few cases are likely to rival that of Hopkinson's in circumstance and prosecution, his case is, understandably, a deterrent for prosecutors looking to bring capital charges in the state.

If a prosecutor other than Spence had been assigned to prosecute Hopkinson, it is unlikely that such a compelling argument about survival would have been presented, nor that Hopkinson would have been so effectively cast as an 'other' whose existence threatened the safety–the *right*, as Spence put it–to survive. Additionally, the chances of securing a conviction against Hopkinson would have been slim, given the circumstantial nature of the evidence against him. 'It was by and large, a "he-said-she-said" body of evidence against the guy', explained one Wyoming attorney who worked on the Hopkinson case as a law student (Harris, 2024). With the narrative that Spence presented, his appointment to the case is arguably what cemented its outcome, which in turn changed the form and frequency with which the death penalty would be used in the state in future.

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[113] *Hopkinson*, 632 P.2d at 162-163.
[114] *Hopkinson*, 632 P.2d at 166.

Having established the Hopkinson case and Governor Finney's decision to reinstate the death penalty as critical junctures for the trajectory of the death penalty retention in Wyoming and Kansas, this project now turns to access the conditions that have reinforced ADF in each state.

C. Self-Reinforcement Conditions

Kansas and Wyoming are states where people want the death penalty, says one capital defence attorney who has represented death-sentenced clients in both states (O'Brien, 2024), but the topic does not have as much political salience as a 'wedge' issue as it once did (Kubic, 2024; Marion, 2024). Legislators in both states perceive the death penalty as a waste of resources (Harris, 2024; Lozano, 2024b), yet others have voted to retain it in law (Russell, 2021; Scott and Baker, 2019), citing its usage as a sentencing option for prosecutors (Erickson, 2021; Lozano, 2024a). Moreover, state and federal courts have frequently intervened in capital cases, overturning death sentences (AP News, 2003; Kansas Legislative Research Department, 2021; 5-7; Neary, 2014). These circumstances, which will be elaborated upon in the following two sections, suggest that ADF is a consequence of prosecutorial discretion and abolitionist shortcomings in Kansas and Wyoming.

The first section will describe the role of 'local legal cultures' (Baumgartner *et al.*, 2020) in establishing and perpetuating ADF, focusing specifically on how prosecutorial discretion in seeking death, defence lawyering in capital cases, and the intervention of state and federal courts in death sentencing are interlocking factors motivating ADF. Then, the next section will shift gears to examine how two near-miss events–(1) death penalty repeal

efforts in the Kansas and Wyoming state legislatures and (2) the decision of the US Supreme Court in *Kansas v. Marsh*–have reinforced ADF in Kansas and Wyoming.

i. Local Legal Cultures

In 2008, Professor Frank Baumgartner introduced the concept of a 'local legal culture' (Baumgartner and Gram, 2015: 63) to describe the self-reinforcing dynamics at the local level which promote or prohibit the use of capital punishment. This term is especially helpful for understanding ADF, as it explains how certain jurisdictions start, and continue, a pattern of execution (or not).

According to Baumgartner and Gram (2015: 63-65), a local legal culture begins to develop when a prosecutor first decides whether to seek death and is based primarily on their expectations of failure or success, as well as historical and arbitrary developments (e.g., racial hostility). If the prosecutor (1) has confidence in their ability to secure a death sentence, (2) believe that the jury will impose death, and (3) think that judges in the district and appellate courts in the region will sanction the sentence, then they are *likely* to seek death when a 'heinous' murder occurs, especially if they have done so before (Baumgartner, 2011). However, if (1) the prosecutor does not have the experience nor the staff to achieve a death sentence, (2) defence attorneys cannot properly represent the defendant, (3) the jury will not impose death, and/or (4) appellate courts will not uphold the death sentence, then it is very *unlikely* that the prosecutor will capitally charge any defendant (Baumgartner and Gram, 2015: 64). Baumgartner *et al.* (2020: 1) concludes: 'the cumulative number of death sentences previously imposed in the same county is a strong predictor of the number imposed in a given year'.

In Kansas and Wyoming, local legal cultures appear present in certain counties, particularly Sedgwick County (KS) and Natrona County (WY) (see Figures 9 and 10), which have sentenced more people to death than others. However, ADF is likely a complication of the local legal culture hypothesis, evincing the 'idiosyncrasies of local district attorneys' (Steiker, 2012: 776), but also the historical developments previously described in Part A (i.e., the race distinction).[115] Prosecutors are afforded substantial discretion in seeking the death penalty and may seek death in cases that appear similar, but ultimately produce very different outcomes. For example, Sedgwick County District Attorney Marc Bennett sought the death penalty in the 'Carr brothers' case, a 'brutal home invasion' that resulted in quadruple murder (Lefler, 2021), and for Cornelius Oliver, who also shot and killed four individuals (Plumlee, 2014). Yet, as one death penalty expert explained in a recent interview, the fact that the Carr brothers case resulted in two death sentences may have been a consequence of the case involving highly publicized, black-on-white crime, as opposed to black-on-black crime as in the Oliver case (Marion, 2024). These disparate outcomes reflect how race might influence jurors, as well as Kansans' ambivalence toward death sentencing. However, they do not fully explain the self-reinforcing dynamics of ADF. Arguably, the want of an option to sentence offenders like the Carr brothers, regardless of whether it is used by prosecutors or meted out by juries, does a better job in explaining how the death penalty remains in law in Kansas and Wyoming.

[115] Baumgartner, Caron and Duxbury (2023: 46-47) find that the cultural norms and racial dynamics that led to lynching a century ago may reflect in the 'local legal culture' of today.

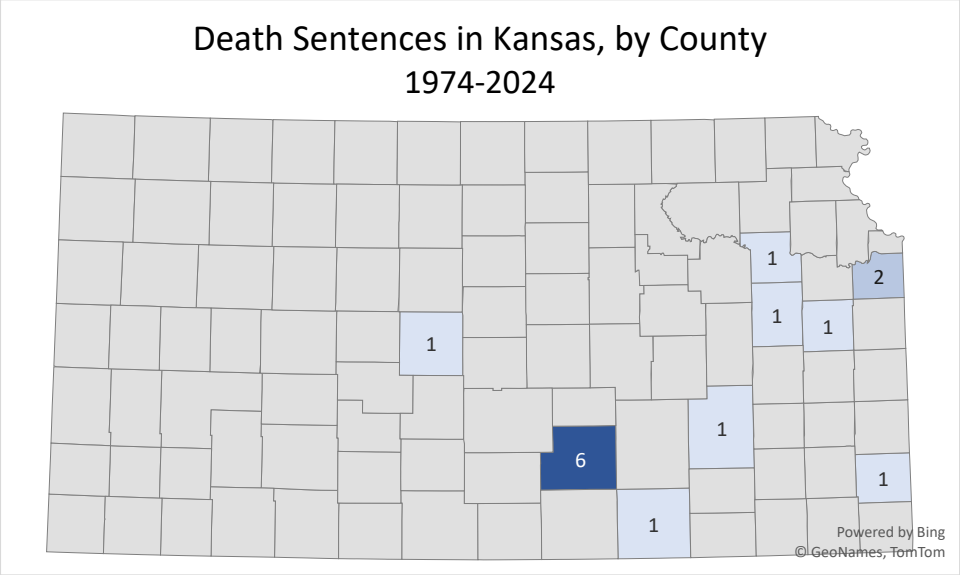


Figure 9. Death sentences in Kansas by county, since 1974. Chart created by the author using data from the Death Penalty Information Center (2022c).

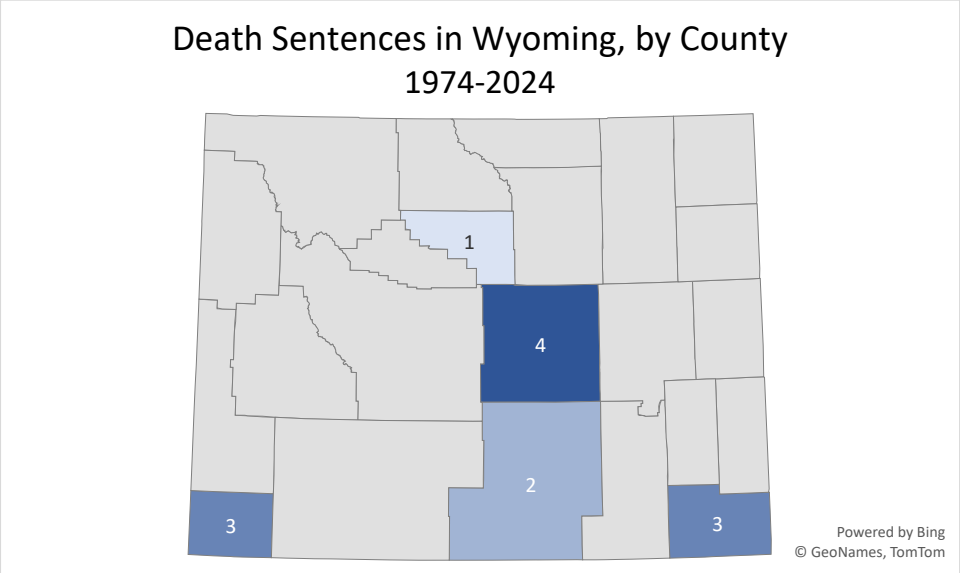


Figure 10. Death sentences in Wyoming by county, since 1974. Chart created by the author using data from the Death Penalty Information Center (2022c).

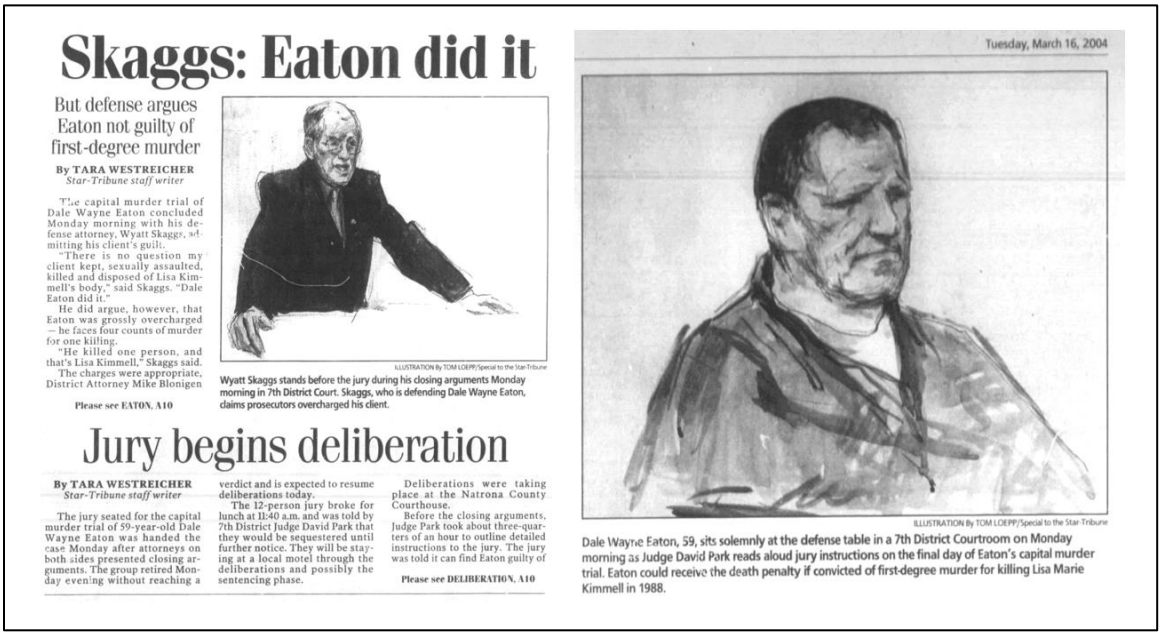
On a different note, the cost of capital cases in Kansas and Wyoming is an element of the local legal culture that fuels ADF due to the increased likelihood of reversible error, which subsequently impacts the ability to carry out executions. In Wyoming, the infrastructure for the state criminal justice system is so underdeveloped that defending

against capital cases once depleted the State Public Defender's annual budget (Lozano, Krzywicki and Roden, 2024: 4). In a recent interview with this author, State Public Defender Diane Lozano estimated that it costs between $500,000 and $1 million dollars to adequately defend a capital case, referencing both the penalty and sentencing phase trials of Nathaniel Castellanos in Laramie County (Lozano, 2024b). Elsewhere, she noted that the defence costs to prepare staff attorneys for the *possibility* of defending against capital cases is somewhere between $50,000 and $80,000 annually (Baker, 2023). Capital defence in Kansas costs about $100k less: for 9 cases between 2004-2011, the Kansas Judicial Council (2014: 1) calculated that it cost a total of $3,561,856 dollars (or $395,762 per case) to defend against the death penalty (on trial and appeal). Understandably, these facts led legal experts to conclude that 'the pressing issues of funding and staffing … threatens the quality of legal representation in Kansas criminal cases' (O'Brien and Bookman, 2022: 14).

Overall, these factors affect the ability of defence lawyers to properly represent their clients, and several cases have been reversed on appeal by state and federal courts in Kansas and Wyoming for substandard defence lawyering (i.e., ineffective assistance of counsel).[116] For example, in Dale Eaton's case, lead trial counsel Wyatt Skaggs (see Figure 13) failed to 'uncover and present voluminous mitigating evidence',[117] believing the best way to succeed in capital cases was to 'rush them to trial' (Harris, 2024). 'He's afraid of the *cost* of doing the work,' explained one of Eaton's capital defence attorneys (Harris, 2024). Such grounds for reversal inform the persistence of ADF because, without being able to see

[116] E.g., *State v. Cheatham*, No. 95,800 (Kan. Jan. 25, 2013); *Eaton v. Wilson*, Case No. 09-CV-261-J (D. Wyo. Nov. 20, 2014).
[117] *Eaton*, Case No. 09-CV-261-J at 342.

a case through to its conclusion, a state necessarily maintains a death penalty system that *sentences* but does not *execute*.



Skaggs: Eaton did it

But defense argues Eaton not guilty of first-degree murder

By TARA WESTREICHER
Star-Tribune staff writer

The capital murder trial of Dale Wayne Eaton concluded Monday morning with his defense attorney, Wyatt Skaggs, admitting his client's guilt.

"There is no question my client kept, sexually assaulted, killed and disposed of Lisa Kimmell's body," said Skaggs. "Dale Eaton did it."

He did argue, however, that Eaton was grossly overcharged — he faces four counts of murder for one killing.

"He killed one person, and that's Lisa Kimmell," Skaggs said. The charges were appropriate, District Attorney Mike Blonigen

Please see EATON, A10

ILLUSTRATION By TOM LOEPP/Special to the Star-Tribune

Wyatt Skaggs stands before the jury during his closing arguments Monday morning in 7th District Court. Skaggs, who is defending Dale Wayne Eaton, claims prosecutors overcharged his client.

Jury begins deliberation

By TARA WESTREICHER
Star-Tribune staff writer

The jury seated for the capital murder trial of 59-year-old Dale Wayne Eaton was handed the case Monday after attorneys on both sides presented closing arguments. The group retired Monday evening without reaching a verdict and is expected to resume deliberations today.

The 12-person jury broke for lunch at 11:40 a.m. and was told by 7th District Judge David Park that they would be sequestered until further notice. They will be staying at a local motel through the deliberations and possibly the sentencing phase.

Deliberations were taking place at the Natrona County Courthouse.

Before the closing arguments, Judge Park took about three-quarters of an hour to outline detailed instructions to the jury. The jury was told it can find Eaton guilty of

Please see DELIBERATION, A10

Tuesday, March 16, 2004

ILLUSTRATION By TOM LOEPP/Special to the Star-Tribune

Dale Wayne Eaton, 59, sits solemnly at the defense table in a 7th District Courtroom on Monday morning as Judge David Park reads aloud jury instructions on the final day of Eaton's capital murder trial. Eaton could receive the death penalty if convicted of first-degree murder for killing Lisa Marie Kimmell in 1988.

Figure 11. Defence attorney Wyatt Skaggs concedes that his client, Dale Eaton, committed murder. Illustrations by Tom Loepp and modified by the author (see Westreicher, 2004a; 2004b).

ii. The Impact of Near-Miss Events on ADF

Several 'near-miss' events (i.e., where change was possible, considered, but rejected) illustrate how the *difficulty* of abolishing the death penalty also contributes to the persistence of ADF. As this section will set out, lawmakers in Kansas and Wyoming have attempted to repeal the death penalty on numerous occasions but were defeated by peers who sought to retain the death penalty to oppose violent crime, spelling uncertainty for future legislative votes. Moreover, while state judiciaries have the power to invalidate capital statutes, such an effort was thwarted in Kansas by the US Supreme Court in *Kansas v. Marsh*,[118] leaving an ambivalent populace with a viable death penalty statute.

[118] 548 U.S. 163 (2006).

In 2010, Senator Carolyn McGinn of Kansas launched an effort to repeal the death penalty that ended in a 20-20 tie vote in the state senate, and in Wyoming, Representative Jared Olsen and Senator Brian Boner championed repeal legislation that passed the state house, but not the senate, in 2019 and 2021. These lawmakers framed abolition as 'a cost-cutting measure' (Baker, 2019; Erickson, 2021), and Senator McGinn specifically suggested that capital case funding could be better spent on solving cold homicide cases (Rothschild, 2010). She argued that victim family members deserved to 'know who murdered their family member' (Death Penalty Information Center, 2010) and pointed out that Kansans had not carried out a death sentence since 1965. On the senate floor in Wyoming, Senator Boner remarked, '[t]he only thing that is real about the death penalty in this state is the cost' (LaChance, 2021).

However, the emotional arguments of these lawmakers' opponents on the house and senate floors effectively rallied the legislative support necessary to defeat all three abolition bills. Perhaps emblematic of the debates in both states, the argument delivered by Wyoming State Senator Tara Nethercott, a Laramie County Republican, emphasized the high crime rate across the country and the lack of 'alternatives for the victim' were the death penalty to be taken away as a 'tool' (Wyoming Legislature, 2024). In concluding her testimony, she described retribution as a core tenant of the US justice system, remarking, 'it's what the *people* have asked for' (Wyoming Legislature, 2024). Effectively, such spirited commentary put an end to each legislative debates, and (1) since 2010, lawmakers in Kansas have not succeeded in delivering another abolition bill to the senate floor, and (2) in Wyoming, legislative support for abolition declined between 2019 and 2021. It appears

that these legislative defeats have solidified the legal basis for capital punishment in Kansas and Wyoming, at least for now.

Lastly, the US Supreme Court's 2006 decision in *Kansas v. Marsh* also illustrates a moment when abolition could have been sustained, but ultimately reinforced ADF. In *Marsh*, the Court upheld the constitutionality of the Kansas death penalty, reversing the Kansas Supreme Court's decision in *State v. Kleypas*[119] that had invalidated the Kansas capital sentencing statute. The Kansas Supreme Court had ruled that, when mitigating factors and aggravating factors in a death penalty case were in equipoise (i.e., of equal weight), then a tie should be awarded to the defendant. This decision deemed the state's death penalty 'facially unconstitutional',[120] since defendants automatically received death in cases of equipoise, and it left open the possibility for the legislature to create and pass a new sentencing statute. However, this appeared unlikely given the legislative challenges surrounding the 1994 reinstatement in the Kansas Legislature. Consequently, for just a moment, Kansas looked like it might remain abolitionist and permanently relinquish its grip on the death penalty.

The US Supreme Court's intervention, however, changed these circumstances, and can be explained by its unwillingness to 'second guess state death penalty policies that meet the minimum *Furman-Gregg* standards' (Brandenburg, 2007: 1459). The Court's decision in *Marsh* affirmed that it is the defendant's responsibility to show that they deserve a sentence less than death, as the language of the state statute had originally suggested. Moreover, it reflected 'the determination of one faction on the Court to prevent

[119] *State v. Kleypas*, No. 80,920 (Kan. Dec. 28, 2001).
[120] *Marsh*, 548 U.S. 163 at 167.

overenforcement of federal constitutional norms' (Steiker and Steiker 2016: 127), and this top-down policing of the Kansas Supreme Court ensured the viability of the state's death penalty statute going forward, directly challenging the state supreme court's interpretation of its own law and decreasing the number of judicial avenues available for abolition. Despite some recent interest in construing the Kansas Constitution in a way that finds the death penalty unconstitutional (Mipro, 2024), a majority of state supreme court justices has yet to signal such intent, reflecting the stabilizing effect of the *Marsh* decision on ADF in Kansas.

Conclusion

This dissertation has sought to understand the causes and persistence of the ADF phenomenon in the US, specifically in Kansas and Wyoming, addressing the gap in scholarship concerning ADF states and their susceptibility to death penalty reinstatement. Chapter One provides a comprehensive literature review, starting with David Garland's sociological analysis of how the death penalty is embedded in American culture and politics, and how the structure of the US polity facilitates ADF. Part B then offered a critique of Carol and Jordan Steiker's blueprint for abolition, which maintains that proportionality review is the most viable path for the US Supreme Court to abolish capital punishment. However, I contend that their approach overlooks the dangers that ADF states pose to abolition. Using Nebraska as an example, I reasoned that ADF jurisdictions undermine the objective evidence criterion of proportionality review, given the uncertainty surrounding their relationship with abolition.

In Chapter Two, I presented the AIMS theoretical framework, adapting historical institutionalism and path dependence to the US context. I introduced the concept of 'co-

evolutionary lock-in' to explain how institutional interactions within the US federalist structure contribute to the persistence of capital punishment. Chapter Three then applied this theoretical framework in a comparative analysis of Kansas and Wyoming, focusing on how antecedent historical conditions, particularly those concerning lynching and gun ownership, have created an enduring 'cowboy culture' that has shaped the retributive nature of death penalty discourse. Survival and safety emerged as key rationales for the retention of the death penalty in these two states, and race and class were also shown to influence perceptions of who deserves execution. Critical junctures, like Governor Finney's reinstatement of the death penalty in Kansas and the prosecution of Mark Hopkinson in Wyoming, were pivotal in initiating and shaping the current forms of ADF. Lastly, I assessed self-reinforcing conditions, such as local legal cultures and near-miss events, and their role in maintaining ADF. Interviewees expressed uncertainty about the future of capital punishment in Kansas and Wyoming, with legislators torn between preserving the death penalty as a tool to fight violent crime and abolishing it due to the financial burden it places on the criminal justice system.

Ultimately, ADF states like Kansas and Wyoming pose unique challenges to abolition. They are not merely on an inevitable path toward abolition *de jure* but remain subject to political and institutional forces that could reignite executions. Through historical, legal, and cultural analysis, this study has shown that ADF is a complex and contingent phenomenon, warranting further investigation to understand its broader implications for the future of the death penalty in the US. Certainly, the points raised herein provide a strong foundation for a larger research project, particularly one that explores the potential consequences of ADF for national abolition in the US.

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