Toward a Modern, Apolitical Death Penalty Abolition Movement in Georgia (and Other Conservative States)

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I. Introduction

Tuesday, January 27, 2015, Georgia executed Warren Lee Hill and made national headlines because Hill was unanimously deemed intellectually disabled by a panel of medical experts. 1 In any other state, Hill would have been ineligible for the death penalty because the Supreme Court has held that the Eighth Amendment to the U.S. Constitution bans the execution of “mentally retarded” defendants. 2 In Georgia, however, the panel’s diagnosis notwithstanding, Hill was not considered “mentally retarded” because Georgia requires a stricter standard of proof that a defendant is intellectually disabled than any other state. 3

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Georgia continues to make national headlines for executing our citizens. Days before Hill’s execution, Georgia executed Andrew Brannan on January 13, 2015. Brannan was a U.S. Army officer during the Vietnam Era, who had been declared one-hundred percent disabled as a result of post-traumatic stress disorder prior to the bizarre incident leading to the shooting of twenty-two-year-old Deputy Sherriff Kyle Dinkheller in January 1998. A month before Brannan’s execution, Georgia executed Robert Wayne Holsey, who had a measured IQ around seventy. Holsey was defended by an attorney who drank a quart of vodka a day during the trial and was more worried about his own crimes, which would ultimately land him in prison, than he was about providing an adequate defense for Holsey. Of course, perhaps the most notorious and embarrassing execution of late was the 2011 execution of Troy Davis, who was convicted of the 1989 murder of Savannah Police Officer Mark MacPhail. Although there was no physical evidence against Davis, seven of the nine witnesses against him had reportedly recanted their testimony, and eleven witnesses identified the State’s key witness as the actual shooter, Davis was executed without a new trial or even an evidentiary hearing.

From 2000 to 2015, Georgia has executed thirty-six inmates, which is an average of just over two executions per year. Also during this time period, Georgia has sentenced twenty-eight defendants to death, resulting in a net change of only eight fewer inmates residing on Georgia’s death row over a span of fifteen years. At that rate, it would take over 150 years to empty Georgia’s death row. Even the most fervent, pro-capital punishment Georgians might not tolerate the government-imposed bloodbath that would rapidly clear out our death row—numbering ninety-four inmates in 2015. Likely, most will never face execution. For example, sixty-three-year-old Virgil Presnell has been on

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5 Id.


7 Id.


9 Id.


12 Id.
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Georgia’s death row since 1976—thirty-nine years—and he is not currently scheduled for execution.\(^\text{13}\)

Georgia is a conservative\(^\text{14}\) state with a law-and-order reputation. Many Georgians view imposing the death penalty as a generally conservative, law and order issue. This Note argues that the death penalty is not innately conservative, because there are arguments against capital punishment that are rooted in conservative principles. These arguments could be employed to bring conservatives in states like Georgia onboard with abolishing capital punishment.

In 2013, two liberal Democrat state representatives from majority African-American districts in Metro-Atlanta introduced House Bill 96 (H.B. 96) to repeal imposition of the death penalty in Georgia.\(^\text{15}\) One of its two co-sponsors, Representative Tyrone Brooks, identifies his occupation as a “civil rights worker,” and is the President of the Georgia Association of Black Elected Officials.\(^\text{16}\) The other co-sponsor, Representative Dee Dawkins-Haigler, is the President of the Georgia Legislative Black Caucus.\(^\text{17}\) The record indicates that H.B. 96 was assigned to Georgia’s House Judiciary Committee and died there without a hearing or a vote.\(^\text{18}\)

H.B. 96 included proposed legislative findings most likely written in an attempt to garner conservative support, three of which especially stand out.\(^\text{19}\) First, that “Georgia recognizes the sanctity of human life up to the time of a natural death” and is a “largely pro-life state.”\(^\text{20}\) Second, that many people have a “natural and healthy distrust” for governments, therefore “it stretches the imagination that anyone would attribute infallibility to the legal system.”\(^\text{21}\) And, third, “that [Georgia] and its political subdivisions can no longer bear the heavy financial burden inextricably tied to the imposition of capital punishment.”\(^\text{22}\)

Pro-life interests, fiscal conservatism, and distrust of the government are high on the list of ideas that define the conservative movement in Georgia and

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\(^{13}\) Id.

\(^{14}\) Political labels—conservative, liberal, libertarian, progressive—are rarely accurate when applied to individual legislators or voters and imprecise when applied to constituencies. Such political labels are, however, a framework that can allow a discussion of both general voting habits and issue interests of individuals and groups concerning building a single-issue bloc that would favor a particular piece of legislation. For that reason, this Note will use these labels to describe the general tendencies of a particular group of voters.


\(^{18}\) Ga. H.B. 96.

\(^{19}\) Id.

\(^{20}\) Id.

\(^{21}\) Id.

\(^{22}\) Id.
the United States. Why, then, were there no conservative co-sponsors? Because in Georgia, and many other southern states, the desire to ban capital punishment is viewed as a liberal idea and has little support among conservatives. During the twentieth century, the abolitionist movement was led by liberals and progressives, and especially late in that century, the tactics of the movement caused a conservative backlash that aligned most conservatives with capital punishment proponents.24

In Part II of this Note, I describe the events of the twentieth century that aligned many conservatives with capital punishment proponents. In Part III, I explain how the cost arguments that were successful in the recent legislative abolition in several states built a coalition of liberals and conservatives that led to abolition in six states. In Part IV, I discuss other historical arguments that could appeal to conservatives. Finally, in Part V, I recommend new rhetoric that may persuade conservative legislators and, more importantly, their constituents to support a legislative ban on the death penalty.

II. Twentieth-Century Events Aligning Conservatives with Capital Punishment Proponents

Some aver that “[w]e live in an era of hyperpolarized, ugly partisanship.”25 The veracity of that statement is outside of this Note’s scope, but assuming its truth, that fact can help to frame why capital punishment is viewed as conservative and why many conservatives oppose its abolition. In the sharply polarized political environment that developed in the late twentieth century, capital punishment became a defining issue between liberals and conservatives. The following is a description of the mechanisms that caused that rift.

A. Judicial Abolition

Throughout the history of the abolition movement in the United States, the majority of the efforts to abolish capital punishment have been directed towards public opinion and have sought legislative abolition. Beginning in the 1960s, however, the National Association for the Advancement of Colored People Legal Defense and Educational Fund (NAACP LDF) developed a “strategy for ridding the nation of capital punishment . . . shift[ing] from the legislative arena to the courts.”26 The NAACP LDF was the prime mover for the effort to have the Supreme Court declare capital punishment unconstitutional.

23 In the context of this Note, the terms abolition and abolitionist movement are used to describe all political movements with the goal of either legislatively or judicially banning capital punishment.

24 See infra Part II.B.

The NAACP’s website describes the NAACP LDF as “the country’s first and foremost civil and human rights law firm.”27 Because the NAACP LDF is a law firm, they thought the courts would provide the ultimate success.28 The NAACP LDF imagined a dual-pronged strategy for the abolition of capital punishment that they called the “moratorium strategy.”29 The first prong was “to block every execution in America through a combination of lawsuits, appeals and other court actions,”30 causing a backlog of condemned prisoners in the state prisons. The NAACP LDF believed that “[the states] would be forced either to abolish capital punishment or to initiate a massive wave of executions.”31 If states had a mass execution bloodbath, the strategy went, it would swing popular opinion against the death penalty, and the states would legislatively abolish it.32 Simultaneously, the second prong entailed an assault on the constitutionality of the death penalty. New York University School of Law Professor Anthony G. Amsterdam summarized this prong of the strategy by saying that if it created a large backlog, then state and federal supreme court justices would find it difficult to turn down constitutionally based appeals because they would “face the awful reality that a decision in favor of capital punishment would start the bloodbath again.”33

Although the NAACP LDF had some success on Fourteenth Amendment issues,34 it was the Eighth Amendment’s ban on cruel and unusual punishment that ultimately caused the Court to impose a short-lived moratorium on capital punishment.35 Murder, the NAACP LDF argument went, was always a grave offense, but some defendants received death penalties when their crimes were in “noways distinguishable from thousands of other [murders] for which the death penalty is not inflicted.”36 What distinguished those accused who received the death penalty from those who did not was not their crimes, but rather their statuses: “[t]hose who are selected to die are the poor and powerless, personally ugly and socially unacceptable.”37 And overwhelmingly, “they are black.”38 The NAACP LDF lawyers provided indisputable statistics to show that black defendants were grossly overrepresented on America’s death rows.39

29 Id.
31 See Haines, supra note 26, at 30.
32 Id.
33 Id.
34 Id.
39 Id.
40 Id. at 51-52.
The strategy culminated in *Furman v. Georgia*, where the Court, in a fractured ruling in which each justice in the majority wrote separately, held that death penalty statutes, as applied, violated the Eighth Amendment. The NAACP LDF campaign led to a ten-year de facto moratorium on execution in the United States from 1967–1977. Despite the campaign’s immediate success, it ultimately failed to achieve the final goal of a lasting moratorium, and essentially caused a backlash that stoked popular support for capital punishment, bringing the issue into the national, political spotlight.

**B. Backlash**

Immediately after *Furman*, “[f]rom Florida to Wyoming, elected officials scrambled to restore the death penalty.” In 1972, California Governor Ronald Reagan and his wife Nancy led the campaign for a ballot initiative to nullify a California Supreme Court ruling that held capital punishment was cruel and unusual. The White House entered the fray with President Richard M. Nixon calling for Congress to restore the federal death penalty. President Nixon made comments that summed-up the views of many conservatives: “The time has come for soft-headed judges to show as much concern for the rights of innocent victims as they do for the rights of convicted criminals.” After criticism for his comments from liberal news media he opined, “[t]here are some who say that law and order are just code words for oppression and bigotry . . . . That is dangerous nonsense. Law and order are code words for goodness and decency in America.”

In *Gregg v. Georgia*, the Court reinstated the death penalty, holding that the new “statutory system under which Gregg was sentenced to death does not violate the Constitution.” The Court also found that “[i]t is apparent from the text of the Constitution itself that the existence of capital punishment was accepted by the Framers,” as well as by the framers of the Fourteenth Amendment. The campaign to seek judicial abolition failed.

**C. Grassroots Liberalism**

When the judicial efforts failed to abolish capital punishment, the NAACP LDF, ACLU, and Southern Poverty Law Center helped to form the National
Coalition to Abolish the Death Penalty (NCADP), a grassroots organization to launch political and public attacks designed to influence legislative abolition. The primary architect of the NCADP was Henry Schwartzchild, Director of the ACLU’s Capital Punishment Project, who previously established the National Coalition for Universal and Unconditional Amnesty (NCUUA), which was an organization founded to pressure President Gerald Ford into granting amnesty to Vietnam-era draft dodgers—men who fled the United States to evade military conscription during the Vietnam Era. The NCUUA’s affiliates “included a wide range of religious, human rights, peace, and civil rights groups,” many of which were active in the Civil Rights Movement. With this, it is not surprising that the NCADP adopted the tactics of peaceful civil disobedience associated with the Civil Rights Movement—sit-ins, prayer vigils, demonstrations (some including mock executions), and occupation of government facilities.

Among the worst organizational failures to gain support for abolition was Operation Besmirchment, whose mission was to humiliate Florida Governor Bob Graham during his 1980 nominating speech for Jimmy Carter. Operation Besmirchment was led by Florida anti-death penalty advocates and sought to disrupt Governor Graham’s speech at the 1980 Democratic National Convention by recruiting delegates (mostly from the ultra-left wing fringe of the party) to hold-up pictures of John Spenkelink and wear black hoods during the speech. Additionally, Spenkelink’s mother, Lois, was spirited onto the convention floor where she sat “facing the man who killed her boy.”

“As protests go, Operation Besmirchment was a huge success”; however, it was a political catastrophe—polls in 1980 showed that Florida voters supported capital punishment by some ninety percent.

Actions like these, influenced by draft dodgers, fringe leftists, and Civil Rights-style protesters, painted the abolition movement into a niche of the political spectrum that alienated much of the population. These tactics invoked strong negative reactions from a wide range of conservative political groups and further polarized the issue of capital punishment. As the twentieth century waned, the battle lines were seemingly drawn quite starkly: conservatives

53 See Haines, supra note 26, at 61.
54 Id.
55 Id.
56 Id. at 59–61.
58 John Spenkelink was the second man executed after the moratorium ended. Id. at 193. He died in Florida on May 25, 1979. Id. Florida Governor Bob Graham signed Spenkelink’s death warrant and was an outspoken advocate of capital punishment. Id. Graham was harassed often by hecklers holding up signs reading, “Bloody Bob!” or “Gov. Death!” Id.
59 Id.
60 Id. at 194.
61 Id.
62 Id. at 194–95.
supported the death penalty, while those who opposed it were almost exclusively liberals. But with the dawn of a new millennium came a new idea.

III. Cost Arguments and Interest Convergence

[T]he last new argument against the death penalty may have been made by Cesare di Beccaria, in 1764.\(^63\)

A. Cost Arguments

Although some argue that there has been nothing new vis-à-vis the death penalty since Cesare Beccaria, other scholars and popular writers might disagree. The twenty-first century has seen the rise of a new argument against capital punishment: it costs too much. In 1914, the cost of execution was probably not much more than the cost of a length of rope. Measured in the death chamber alone, the costs in 2015 still are relatively small: current costs of lethal injection drugs are about $1200 per execution.\(^64\) However, 2015 total compounded costs of execution are astronomical. To merely consider the cost in the death chamber, as analogized by Professor Richard Dieter, Executive Director of the Death Penalty Information Center, would be the equivalent of measuring the cost of going to the moon by merely counting the price of a rocket and lander without considering the cost of research and development, test flights, ground support, and “all the failures and partial successes that necessarily precede such a complicated venture.”\(^65\)

A recent and apropos example is the trial of Jodi Arias, a young woman who was convicted in 2013 of the 2008 murder of her sometimes-boyfriend Travis Alexander in Mesa, Arizona.\(^66\) Prosecutors pursued the death penalty because

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\(^{64}\) Molly Hennessy-Fiske, Death Penalty: Cost of Execution Drugs—and Executions—Rises, L.A. TIMES (Feb. 24, 2012), http://articles.latimes.com/2012/feb/24/nation/la-na-nn-execution-drugs-20120224. In 2011, Texas estimated the cost of lethal injection drugs at $83.55, which increased to $1286.86 after switching to pentobarbital. \textit{Id}. Recently, however, pentobarbital has become problematic because the manufacturer, a Danish company, refused to sell the drug for lethal injections. \textit{Id}. The move forced states to experiment with other drugs, leading to three botched executions and a sharply divided Supreme Court, which ruled that the use of certain lethal injection drugs does not amount to cruel and unusual punishment. Glossip v. Gross, 135 S. Ct. 2726, 2737–38 (2015) (5-4 decision) (holding that petitioners failed to prove an objectively intolerable risk of severe pain).


they believed the murder was committed in an “especially heinous, cruel or depraved manner.” The trial court declared a mistrial due to jury deadlock during the sentencing phase, after which prosecutors chose to retry the sentencing phase, again seeking the death penalty. In 2015, after another trial of over four months, the second jury also failed to return a unanimous verdict for death. Arizona law required the court to sentence Arias to life in prison without the possibility of parole, because the second jury failed to return a unanimous recommendation for death. The Jodi Arias trials for capital punishment cost taxpayers of Maricopa County well over $3.2 million, whereas the average cost of a murder trial is only $333,627.56. Using those numbers, the Jodi Arias trial cost Arizona tax payers nearly ten times as much as a murder trial that did not seek the death penalty. The extra money was wasted—Arias still received a sentence of life without the possibility of parole.

There is little debate about the matter of cost, since both proponents and opponents of capital punishment generally agree that the death penalty costs substantially more than its alternative of life imprisonment without the possibility of parole. To find a serious argument that contends that the death penalty does not necessarily cost more, one would need to look back to 1997. In a Federalist Society publication, Gary D. Beatty argued that execution could be much cheaper if anti-death penalty lawyers did not oppose the death penalty.

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69 Id.


71 David Schwartz, Jodi Arias Trial to Cost Arizona Taxpayers More Than $3.2 Million: Officials, Yahoo! News (Mar. 6, 2015, 4:09 PM), http://news.yahoo.com/jodi-arias-trial-cost-arizona-taxpayers-more-3-210938006.html. The estimate is well short of reality. It includes defense costs of $3.1 million and $166,000 in prosecution travel expenses and witness fees, but does not include law enforcement investigative costs, court costs, or salaries for the prosecutor and support staff. Id.


73 Thomas J. Walsh, On the Abolition of Man: A Discussion of the Moral and Legal Issues Surrounding the Death Penalty, 44 Clev. St. L. Rev. 23, 37 (1996) (“There exists very little dispute that imposing the death penalty is more costly if for no other reason than prison guards are cheaper than appeals attorneys.”).

That analysis is strained and misplaced. What Beatty argued, in slightly different terms, was that the death penalty would be much more efficient if defendants would just accept their punishment.

Another argument was made in 2002 by former Tennessee House Representative Chris Clem in response to claims about the high cost of executions:

Executions do not have to cost that much. We could hang them and re-use the rope. No cost! Or we could use firing squads and ask for volunteer firing squad members who would provide their own guns and ammunition. Again, no cost.75

This is the classic argument that succumbs to Professor Deiter’s analogy for missions to the moon and can be readily dismissed. Another popular misconception is that the costs of incarceration for life without the possibility of parole outweigh its trial costs. However, even if Jodi Arias lives to be ninety-five years old, her incarceration will cost the state $1.5 million, which is still less than half the cost associated with her capital punishment defense.76

Moreover, studies have borne out the assertion that the death penalty’s costs greatly surpass life without the possibility of parole. Although Georgia and many other southern states have not conducted a study of death penalty costs, looking at studies from states in different regions is useful. A 2006 study in Washington concluded that first degree aggravated murder cases in which the death penalty is sought cost over $1 million more than first degree aggravated murder cases in which the death penalty is not sought.77 A 2008 study in Maryland found the difference to be $1.9 million per case, with nearly seventy percent of the added costs occurring during trial.78 A 2011 study authored by United States Ninth Circuit Judge Arthur L. Alarcon and Loyola Law School Professor Paula M. Mitchell concluded that California has spent over $4 billion on capital punishment since 1978 and executed only thirteen people during that time—the equivalent of over $300 million per person actually executed!79 According to the Death Penalty Information Center, Florida was spending an additional $51 million per year on the death penalty in 2000, or about $24

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million per person executed. In Idaho, the public defenders’ appeals division reported that the average time logged on a non-capital appeal is 179 hours, but for capital appeals it is a whopping 7918 hours per defendant—all paid by the taxpayers of Idaho.

B. Interest Convergence

In her Note, Jolie McLaughlin argues that “by giving state legislatures a self-interested reason to abolish capital punishment—saving their constituents millions of dollars (and increasing their chances of reelection)—anti-death penalty advocates have aligned state lawmakers’ interests with their own. The result has been an apparent turning point for death penalty reform in America.” McLaughlin went on to describe how arguments about the cost of capital punishment greatly influenced legislators in New Jersey, New Mexico, Illinois, Connecticut, and Maryland as they decided whether to abolish capital punishment. Ultimately, those arguments were powerful and helped abolitionists prevail in those states. Maurice Chammah agreed, contending that “[e]ven in states that retain the punishment, cost has played a central role in the conversion narratives of conservative lawmakers, public officials, and others who question the death penalty as a waste of taxpayer dollars.” In her Note, McLaughlin further concluded that anti-death penalty “advocates should continue to focus their strategy on an economic-based approach, at least while states’ budget woes persist.” Budgetary woes aside, it is 2016 and the cost arguments (assuming Georgia legislators have heard them) have not turned the tide in Georgia—it is time to bring other arguments to bear.

IV. New Life for Old Arguments

Republicans value individual liberty, and that means cost-limited constitutional government and respect for individual empowerment rather than an empowered state.

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83 Id. at 693–704.
84 Id.
86 McLaughlin, supra note 82, at 710.
Jolie McLaughlin’s Note analysis that abolitionists should focus their strategic efforts on economic-based arguments asserts an either-or mentality that will not best serve abolition efforts in Georgia (or other conservative states). Moral arguments still have the power to persuade both liberals and conservatives. What is needed is a new model based on a strategy to build a broad coalition made up of three distinct (albeit often overlapping) political constituencies: civil-rights liberals, fiscal conservatives, and new libertarians. 88

A. Republicanism

New libertarians generally see government as the protector of citizens’ rights and they have a deep distrust of government overreach. Recently, many staunchly conservative individuals and groups have begun to look at reforming the United States criminal justice system. 89 Most of these groups focus on issues of over-criminalization, mass incarceration, and the related issue of civil forfeiture, but there is room in that political tent for death penalty reform.

Since the founding of our Republic, there has been organized opposition to the death penalty based on the concept of overreach and over-empowerment of government. In 1792, Dr. Benjamin Rush wrote that “capital punishments are the natural offspring of monarchical governments.” 90 Rush asserted that since kings considered their subjects as mere property because the monarchy saw its powers as being granted by divine right, then one could not wonder why kings “shed their [subjects’] blood with as little emotion as men shed the blood of their sheep or cattle.” 91

Rush’s political argument carried over from the period of the American Revolution into the nineteenth century, evolving into a twofold attack on capital

88 The term “new libertarian” is not widely accepted, but it describes the voters that need to be brought into the anti-death penalty movement. Generally, these voters are highly skeptical of government power, they see individual rights as the touchstone of our system, they believe in fiscally responsible policies, and they usually vote with the Republican Party.

89 Wesley Lowrey, The Bipartisan Push for Criminal Justice Gets a Koch-Funded Boost, Wash. Post (Feb. 19, 2015), http://www.washingtonpost.com/blogs/post-politics/wp/2015/02/19/the-bipartisan-push-for-criminal-justice-gets-a-koch-funded-boost/ (discussing Koch Industries’ $5-million pledge to support the Coalition for Public Safety, which has broad support from across the political spectrum ranging from “Tea Party groups such as FreedomWorks to Grover Norquist’s Americans for Tax Reform to liberal groups including the American Civil Liberties Union and the Center for American Progress”); Zoe Carpenter, One Thing Republicans and Democrats Are Starting to Work Together On (and It’s Not War), Nation (Feb. 20, 2015), http://www.thenation.com/blog/198681/can-left-right-alliances-break-americas-addiction-mass-incarceration.

90 Dagobert D. Runes, The Selected Writings of Benjamin Rush, 52 (1947). My faculty mentor, Professor Joseph D’Agostino, objected to my including this often quoted passage by pointing out that nearly every republic since Athens has, at some point, embraced capital punishment. Be that as it may, Rush’s point is still just as valid—a government should not shed the blood of its citizens as if they were so many sheep or cattle. Many a republic has accepted chattel slavery, public beatings, and debtor’s prisons as well, but I think it wrong to embrace any of those practices, too.

91 Id.
punishment. First, “legitimate government was limited in its powers to protection of property and opportunity and to provision for the common defense.” The argument continues, if prisons were adequate to protect society from criminals, then the government did not have a legitimate interest in capital punishment. Second, execution represented “a dangerous [government] intrusion into the sphere of individual rights.” This republican argument that was part of the anti-capital punishment lexicon throughout the nineteenth century, nearly disappeared in the twentieth century.

In 2001, Professor Austin Sarat breathed new life into this abolitionist’s republican argument in his monograph, When the State Kills: Capital Punishment and the American Condition. Professor Sarat argues that public executions as practiced nearly everywhere until the twentieth century “were designed to make the state’s ultimate power majestically visible to all.” The message then was, “[l]ive but live by the grace of the sovereign, live but remember that your life belongs to the state.” Executions (or, to use Sarat’s term, “state killings”) have now been “transformed from dramatic spectacle to . . . semiprivate, sacrificial ceremonies in which a few selected witnesses are gathered . . . to see and, in their seeing, to sanctify[] the state’s killing of one of its citizens.”

Executions, however, even done in seclusion, still represent a display of the state’s sovereignty over the citizens. Professor Sarat avers that “state killing is part of a strategy of governance that makes us fearful and dependent on the state.”

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92 David Brion Davis, From Homicide to Slavery: Studies in American Culture 29 (1986).

93 Id. The U.S. Constitution presents this same sentiment as follows: “provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity.” U.S. Const. pmbl.

94 The idea that prisons could protect the citizenry from criminals was relatively new in the early nineteenth century. Robert Johnson et. al., The American Prison in Historical Perspective: Race, Gender, and Adjustment, in Prisons: Today and Tomorrow 23–26 (Joycelyn M. Pollock ed., 1997). The first United States prison, the Walnut Street Jail in Philadelphia, was built in 1790, and it was a penitentiary. Id. Penitentiaries were literally places to do penitence because they were built on the idea that criminals could be brought back into the mainstream of Christianity through rational, disciplined living and reflection on their sin. Id. Prior to that time, many crimes brought the punishment of execution because killing was viewed as the only way to incapacitate a criminal and there was little thought about rehabilitating criminals. Id. With prisons, criminals could be incapacitated, both long term and short term through incarceration and, thanks to penitentiaries, society began to see a possibility of rehabilitation. Id.

95 Davis, supra note 92, at 29.

96 Id.

97 Austin Sarat, When The State Kills: Capital Punishment and the American Condition (2001). Professor Sarat’s writing could hardly be considered conservative, yet his new analysis of the old republican argument is closely related to new libertarian ideology. Thus, a discussion of Professor Sarat’s point of view is included in this Note at the risk of alienating certain conservatives.

98 Id. at 67.

99 Id.

100 Id. at 18, 28.

101 Id.
illusion of state protection . . . [and] promises simple solutions to complex problems.”

102 Professor Sarat further contends that the death penalty contributes to “the erosion of basic legal protections and legal values in favor of short-term political expediency.”

103 Ultimately, Professor Sarat argues to abolish capital punishment not merely because it fails retributive and deterrent goals of punishment by legitimating vengeance, but also because it damages society by breaking the bond between citizens and government and incentivizing partisan divisions.

104 In other words, it damages the underpinnings of our Republic.

Accordingly, this republican argument, though not asserted much in the twentieth century, is a prime argument to appeal to new libertarians. It can be framed in one of two ways. First, government can sufficiently protect its citizens from violent murderers by removing them from society, and that is as far as we should allow republican governments to go. Second, allowing government to exact lethal revenge against its own citizens unacceptably allows the government to infringe on a citizen’s right to life.

B. Innocence (or the Fallibility of Government)

No other practical argument cuts more sharply against capital punishment than the risk of executing an innocent person.

105 City University of New York School of Law Professor Jeffrey L. Kirchmeier aptly asserts that “[c]oncerns about executing the innocent probably existed since human beings first began legal executions as punishment.”

106 The innocence argument, however, was not widely used in scholarship in the United States until the Progressive Era (1900–1920).

107 But during that time period it appears in the abolitionist repertoire. One abolitionist, quoted in a 1915 article in South Dakota’s Pierre Daily Capital said, “errors in conviction are only too likely in cases where public sentiment rules and the [jurors] are only human . . . . After a man was hanged . . . no evidence nor court order could bring him back, even though he was proven innocent.”

108 An Oregon newspaper article in 1915 “conceded that Oregon sometimes executed innocent people.”

109 And in 1917, a Missouri bill to abolish capital punishment was touted as a means of “removing the real possibility of sentencing the innocent to death.”

110 During the late twentieth century, the innocence argument found its best ally and, ironically, its biggest hurdle: DNA evidence. The Innocence Project

102 Id. at 247.
103 Id. at 30.
104 Id. at 247.
105 See FLANDERS, supra note 30, at 31.

107 Id. at 408–09.
109 Id. at 550.
110 Id. at 555.
reported in December 2014 that 325 persons have been “fully exonerated” by DNA evidence. Over 100 of those exonerated were convicted of “homicide related” offenses. Twenty of those exonerated were on death row awaiting execution. DNA evidence, along with the so-called “CSI effect,” has led many Americans to believe that scientific evidence predominates the courtroom and that scientific evidence will exculpate any wrongfully convicted defendant. Even Supreme Court Justices apparently are susceptible to the CSI effect:

It should be noted at the outset that the dissent does not discuss a single case—not one—in which it is clear that a person was executed for a crime he did not commit. If such an event had occurred in recent years, we would not have to hunt for it; the innocent’s name would be shouted from the rooftops by the abolition lobby. The dissent makes much of the new-found capacity of DNA testing to establish innocence. But in every case of an executed defendant of which I am aware, that technology has confirmed guilt.

Unfortunately, scientific evidence is not available in every case. Many murder convictions resulting in the death penalty are still based on witness testimony—oftentimes coerced or bargained-for by police. A quick look at the cases of the Innocence Project shows that eyewitness misidentification, false confessions, bad informants, and government misconduct still account for a good many murder convictions. The Death Penalty Information Center lists 150 death row inmates who were completely exculpated by evidence other than DNA.

No innocents executed? That is most likely untrue. Writing for Death Penalty Focus (an abolitionist publication), Leslie Fullbright quoted former Supreme Court Justice Scalia in 2006:

No innocent person has ever been executed in the United States.


113 So named for the popular CBS television franchise, CSI: Crime Scene Investigation, that depicts crimes solved by brilliant forensic laboratory work. Donald E. Shelton, The “CSI Effect”: Does It Really Exist?, Nat’l Inst. for Just. (Mar. 17, 2008), http://www.nij.gov/journals/259/pages/csi-effect.aspx (“Many attorneys, judges, and journalists have claimed that watching television programs like CSI has caused jurors to wrongfully acquit guilty defendants when no scientific evidence has been presented.”).


116 The Innocence List, Death Penalty Info. Ctr., http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row (last visited May 31, 2016) (including on this list only convicted defendants who were sentenced to death and were subsequently acquitted or were granted a complete pardon based on proof of innocence, or where the prosecution dismissed charges).
Supreme Court Justice John Paul Stevens as opining, “‘beyond a shadow of a
doubt’ that Texas executed an innocent man in 1989.” Justice Stevens was
referring to the case of Carlos DeLuna who was executed in Texas in 1989 for
the 1983 murder of Wanda Lopez with a lock-blade buck knife during a gas
station armed robbery. The only evidence against DeLuna was the testimony
of one eyewitness who admitted twenty-one years after trial that he was about
seventy-percent certain that DeLuna was the man he saw exiting the gas station,
but he “had trouble telling Hispanics apart and judging their age.” Through a
series of investigative blunders, misidentification, and poor police work, DeLuna
was tried, convicted, sentenced, and executed for a crime that was probably
committed by a man named Carlos Hernandez who lived in the neighborhood,
“whose brutal life was punctuated by sometimes deadly violence, much of it
directed towards poor, young Hispanic women in Corpus Christi, often with a
lock-blade buck knife,” and who looked so much like Carlos DeLuna that
Hernandez’s brother-in-law mistook a picture of DeLuna for Hernandez.

Carroll Pickett served as the Death House Chaplain in Texas and officiated
at ninety-five executions. Part of his job was to “ease[] a prisoner through his
last day and onto the gurney where he was injected with poison until dead.” In
his experience, ninety-five executions, Pickett only felt the need to seek
psychiatric care twice—both times regarding Carlos DeLuna, who he believed
was a wrongly convicted and innocent man who was executed.

The NCADP contends that there are at least four innocent men who have
been executed since 1980: Carlos DeLuna, discussed above, along with Larry
Griffin, Ruben Cantu, and Cameron Todd Willingham. Larry Griffin was
executed in Missouri in June 1995, based on testimony from an “eyewitness”
who was a convicted felon in the witness protection program (waiting, at the
time of Griffin’s alleged murder, to testify in a murder trial where the jury
apparently did not believe his testimony), was almost certainly not at the crime
scene, and was released from custody the day Griffin was convicted. Ruben
Cantu, who the Houston Chronicle believes was framed by police, was executed

117 Leslie Fullbright, Supreme Court Justice Calls for End to Death Penalty, Death Penalty Focus (Jan. 29, 2015), http://deathpenalty.org/article.php?id=784. This statement by Justice Stevens is remarkable, but seemingly was not reported in any other media.


120 See Liebman et al., supra note 118, at 720.

121 Id. at 719.

122 Id.

123 Id.


125 Innocent and Executed: Four Chapters in the Life and Death of America’s Death Penalty, NAT’L COAL. TO ABOLISH THE DEATH PENALTY 1, http://b.3cdn.net/ncadp/d245477f72f03c18f99_1pm6bsa34.pdf (last visited May 31, 2016).

126 Id. at 4–5.
in Texas in 1993.\textsuperscript{127} And Cameron Todd Willingham was executed in Texas in 2004 for murdering his three daughters in an arson-homicide.\textsuperscript{128} Arson investigators provided most of the evidence against Willingham, but in a report published before his conviction, one which advanced the state-of-the-science of arson investigation, nearly every indicator upon which the Willingham investigators relied was debunked.\textsuperscript{129} It appears that the fire that caused the death of Willingham’s daughters was likely an accident.\textsuperscript{130}

Like Texas and Missouri, Georgia is not immune from executing a likely-innocent person. In fact, many believe that Georgia has already done so by executing Troy Davis for the August 1989 murder of Savannah Police Officer Mark MacPhail after new evidence pointed to Davis’s innocence, but he was refused a new trial.\textsuperscript{131}

C. Lack of Deterrence

Deterrence is about state of mind. Deterring an action means causing the actor to consider the punishment and to choose not to engage in the conduct because of the threat of punishment.\textsuperscript{132} Simply put, deterrence means that the threat of execution either keeps an individual who has already committed a murder from committing another murder (specific deterrence), or that the threat and example of executions prevent members of society writ large from committing murder (general deterrence).\textsuperscript{133} It is an understatement to say that the statistical arguments for and against deterrence are contradictory—in fact they attack each other directly with each side contending that the other side’s data is flawed.\textsuperscript{134} Some authors found that there is a “super-deterrent” effect.\textsuperscript{135} Others found that capital punishment actually increases the murder rate.\textsuperscript{136}

\textsuperscript{127} Id. at 6–7.
\textsuperscript{128} Id. at 8.
\textsuperscript{129} Id. at 9.
\textsuperscript{130} Id.
\textsuperscript{131} See, e.g., Ed Pilkington, \textit{Troy Davis: 10 Reasons Why He Should Not Be Executed}, \textit{Guardian} (Sep. 21, 2011), http://www.theguardian.com/world/2011/sep/21/troy-davis-10-reasons. Troy Davis was convicted based on the testimony of nine witnesses—seven of whom later recanted their testimony. Id. Additionally, nine witnesses later implicated Sylvester “Red” Coles, the State’s star witness in the original trial, as the shooter. Id.; see generally \textit{In re Davis}, No. CV409-130, 2010 WL 3385081 (S.D. Ga. Aug. 24, 2010) (recounting all trial testimony and analyzing Davis’s new evidence implicating Coles). Ultimately, all involved state and federal courts held that this new evidence was not sufficient to grant a new trial. Davis v. State, 651 S.E.2d 10, 12 (Ga. 2007) (holding that Davis’s evidence was insufficient to prove reversible error); \textit{In re Davis}, No. CV409-130, 2010 WL 3385081, at *34–37, *60 (recounting all proceedings subsequent to conviction at trial, and holding Davis’s new evidence insufficient to prove innocence).
\textsuperscript{133} Id.
\textsuperscript{134} See John J. Donahue & Justin Wolfers, \textit{Uses and Abuses of Empirical Evidence in the Death Penalty Debate}, 58 \textit{Stan. L. Rev.} 791, 843 (2006) (surveying many of the most prominent authors’ empirical studies of the deterrent effect of executions, and concluding that “execution policy drives little of the year-to-year variation in homicide rates,” and
Texas Tech School of Law Professor Arnold H. Loewy asserts two excellent reasons for doubting the statistical analyses that lead to the super-deterrent effect. First, the findings do not comport with reality when comparing either nations or states with and without capital punishment. Second, the deterrent effect strikes him as counterintuitive:

[I]f we were to posit a totally rational potential killer, the killer would have to decide that, assuming even odds of capture and conviction, the arch-enemy (or victim for hire) is worth killing for the risk of life imprisonment without parole but is not worth killing for the same risk of the death penalty.

Logic would tell us that if capital punishment were a deterrent, fewer murders should occur in jurisdictions that allow for executions. Prison murders should provide an apt example because, ostensibly, prisoners are more likely to be apprehended, tried, and convicted of a murder in prison than the general population. So, one would expect fewer prison murders where there was the possibility of the death penalty, if there is a real deterrent effect. But, a 2005 Bureau of Justice Statistics study found that in 2002, ninety-eight percent of prison murders occurred in jurisdictions that had the death penalty. In fact, of the eighty-seven prison murders that year, only one occurred in a state with no death penalty.

In addition to the statistical attacks on deterrence, another argument against deterrence harkens back to Cesare Beccaria. Beccaria argued that, when it comes to deterrence, celerity and certainty of punishment were more critical than severity. Long-term imprisonment (or “slavery,” as Beccaria called it) was a more effective deterrent than death.


Id. (finding that (a) the United States has a higher murder rate as compared to nations that do not have the death penalty, such as Australia, Canada, England, and Germany; (b) states with the death penalty have a higher murder rate on average as compared to states that do not have the death penalty; and (c) there is essentially no difference in the murder rate in a comparison between neighboring states with similar demographics, regardless of whether those states have the death penalty).

Id. at 193.


Id. at 45.
watching a prisoner live in captivity would provide a better deterrent to society than the relatively quick example provided by death.\textsuperscript{144}

This argument against deterrence pre-dates modern statistics. In 1897, Colorado Governor Alva Adams’s Biennial Message “reported that of the twenty-five murderers condemned to die in the state penitentiary [between 1890 to 1896], thirteen had been reprieved and thus, the death penalty carried little deterrent effect. He opined: ‘Nothing is so appalling to a criminal as certainty of a life sentence, with no hope of pardon.’”\textsuperscript{145} In 1912, Arizona Governor George E. P. Hunt said that he believed “that a more fearful and effective example to others lies in the certainty of imprisonment than in the fleeting fear of death, a fear which temporarily has no place in the passion-heated or drunk-crazed brain.”\textsuperscript{146} In 1914, Oregon Governor Oswald West, while discussing the reluctance of juries to apply death sentences, concluded that a “‘desperate criminal . . . is more willing to take a gambler’s chance with death . . . than he would be to face the greater certainty of life spent behind the bars.’”\textsuperscript{147} If Beccaria’s three elements of deterrence are to be believed, a swift trial and certain sentence of life without the possibility of parole should be a better deterrent than the vague threat of execution.\textsuperscript{148}

V. New Rhetoric to Persuade Conservative Legislators and Their Constituents to Support Abolition of the Death Penalty

Republicans hold 119 of 180 seats in the Georgia Legislature; Democrats hold only 60 (one seat is independent). Georgia is not unique in its demographic make-up; it looks like many other southern states. Race is a good predictor of voting habits: non-white likely means Democrat, and Democrats are more likely to be progressive or liberal on issues of crime and punishment.\textsuperscript{149} With the right appeal, one may well expect a majority of Democrats to vote for repealing capital punishment, which means that one would need over half of the Republican votes to pass legislation to abolish the death penalty. The Georgia Republican Party (like the GOP nationwide) is making efforts to attract new voters—young and

\textsuperscript{144} \textit{Id.}
\textsuperscript{145} See Galliher, supra note 108, at 553 (quoting Biennial Message of Gov. Alva Adams and Inaugural Address of Gov. Charles S. Thompson to the Twelfth General Assembly of the State of Colorado 24–25 (1899)).
\textsuperscript{146} \textit{Id.} at 551.
\textsuperscript{147} \textit{Id.} at 549 (quoting Robert H. Dann, Capital Punishment in Oregon, 284 Annals Am. Acad. Pol. & Soc. Sci. 110, 110 (1952) (quoting a statement made by Governor Oswald West to the Oregon legislature in 1911)).
\textsuperscript{148} See Arbitrariness, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/arbitrariness (last updated July 16, 2015) (averring that only two percent of known murderers in the United States are executed).
minority—and one way to do that is by forwarding a policy that purports to improve the criminal justice system. Georgia Governor Nathan Deal is doing just that, and conservatives are embracing it. All that is needed now is the rhetoric to build a bi-partisan consensus that includes liberals, progressives, traditional fiscal conservatives, and new libertarians.

The liberal groups that opposed capital punishment in the mid-to-late twentieth century still oppose it today. Among the reasons for their opposition are: that it is applied in a racially-biased manner; it condemns the poor, developmentally challenged, and powerless to death while the rich are seldom subject to it; and it is not in keeping with our modern societal norms. The ACLU, NAACP LDF, and NCADP still hold sway with progressives. As H.B. 96 displayed, Georgia liberals and progressives likely need no new arguments to support a legislative ban on capital punishment.

What then are the arguments that can bring conservatives into the abolition movement? First, by linking the cost of the death penalty with the lack of deterrence, a strong argument can be made that capital punishment is fiscally irresponsible. Second, by linking the republican abolitionist argument with the innocence argument, a strong argument can be made that even if capital punishment is desirable, any person who believes in republicanism cannot allow the government to execute (or even condemn to death) an innocent person.

Conservatives value fiscally responsible government. In particular, for the last five years, the Tea Party Movement has become a major influence on conservatives in Georgia and nationwide. The Tea Party Movement is, however, nebulous. Unlike the Democrat and Republican Parties, which have appointed leadership, national committees, official platforms, and policy statements, the Tea Party is a grassroots political movement that is not unified by a single leader, platform, or official policy statement. There are, however, a widely accepted set of beliefs. First among them is to “Eliminate Excessive Taxes” because “[e]xcessively high taxes are a burden for those exercising their personal liberty to work hard and prosper as afforded by the Constitution. A fiscally responsible government protects the freedom of its citizens to enjoy the fruits of their own labor without interference from a government that has exceeded its necessary size, scope and reach into the lives of its citizens.” In short, the Tea Party stands for fiscal responsibility.

Here it is worth distinguishing absolute cost from value. Conservatives do not necessarily eschew government spending. For example, consider defense spending. Many conservatives view defense spending (even though it accounts

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152 See supra notes 14–23 and accompanying text.
for nearly twenty percent of our Federal budget) as necessary to the well-being of the nation because we get something valuable for the cost. In fact, many consider it fiscally responsible. Which begs the question: is capital punishment fiscally responsible? The question is actually quite complicated, but for simplicity’s sake, this Note proposes we change the question to two simpler ones: (1) does capital punishment cost substantially more than the alternative sanction of life in prison without the possibility of parole?; and (2) if capital punishment is more expensive, does the State receive some benefit for the expenditure? If the answers are “yes” and “no,” respectively, then we can surmise that no matter how one defines the term “fiscally responsible,” the answer to the overarching question is that capital punishment is not fiscally responsible. This Note previously described the cost of capital punishment and the fact that there appears to be no measurable deterrent effect. Because deterrence is widely viewed as the “benefit” of the death penalty, therefore, the huge expenditure cannot be justified if society receives no value.

Government is fallible, but execution requires perfection. Even if one believes that a republican government has the right to execute the guilty, no person who believes that governments exist to protect the rights of their citizens could allow the execution of innocent citizens. That surely represents “a dangerous [government] intrusion into the sphere of individual rights,” which shatters the necessary trust and bond between a government and its citizens. Contrary to Justice Antonin Scalia’s contention, there most likely have been innocent people executed in the United States, perhaps even in Georgia; therefore, a government created to protect the life, liberty, and property of its citizens should not be empowered to execute citizens.

V. Conclusion

With the right rhetorical stance, and the money to present the ideas, Georgia could well be the first southern state to ban capital punishment. Liberals and conservatives can find substantial common ground on the issue. Republicans can use the issue as a way to draw young and minority voters into the party. A campaign to present both the fiscal irresponsibility argument and the argument that innocents may be killed by government overreach could sway voters and give fodder to legislators who want to lower overall expenditures. With the right direction and inspiration, a new coalition of liberals and conservatives could lead an effort that might culminate in a rewrite of Georgia’s 2013 H.B. 96—one that could pass in the next few years if the abolition movement in Georgia fights to unify its supporters.

155 DAVIS, supra note 92, at 29.
156 SARAT, supra note 97 at 247.