Yes on Death: California’s 1972 and 1978 Death Penalty Initiatives

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For a timeline that describes the initiatives, laws, and court cases, see Appendix 1

For definitions of a “law-and-order” framework and a “tough-on-crime” framework, see Appendix 2
Introduction

In 1963, three years after strong public opposition to Caryl Chessman’s execution, California’s capital punishment law was on life support. The law had not been amended since 1874, and a statewide death penalty moratorium started in 1963.\(^1\) Governor Ronald Reagan broke the moratorium once in 1967, a culmination of his 1966 “law and order” campaign.\(^2\) That “law-and-order” framework later was key to the resurgence of the death penalty, but people at the time did not know that. For them, the writing on the wall was becoming increasingly clear: the death penalty in California would soon be a relic of the past.\(^3\) In addition to the de facto limit on capital punishment, legal cases challenging the death penalty came increasingly close to banning the practice. In 1968, the California Supreme Court questioned the constitutionality of unlimited jury discretion in capital cases in *In Re Anderson*, but the Court ruled that the death penalty did not violate the California or U.S. Constitutions at the time.\(^4\) In a separate case, *McGautha v. California* (1971), the U.S. Supreme Court similarly ruled that it was constitutional for juries to have unlimited discretion in capital punishment cases.\(^5\) In California, the issue came to a head in 1972. The defendant from *In Re Anderson*, Robert Page Anderson, had another appeal before the California Supreme Court. While the Court had upheld the constitutionality of the death penalty overall in 1968, it had struck down Anderson’s death sentence because of jury

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5 Schwab, “The History of the Death Penalty in California,” 8. *McGautha* was one of a series of cases in the late 1960s and early 1970s in which the U.S. Supreme Court reviewed the constitutionality of the death penalty. While it was reviewing the cases, there were no executions in the United States; the last execution before this period was the execution of Luis Monge in Colorado in 1967. Hugo Adam Bedau, *Killing as Punishment: Reflections on the Death Penalty in America* (Boston, MA: Northeastern University Press, 2004), 209.
selection issues. A subsequent jury re-sentenced Anderson to death, and *People v. Anderson* represented a challenge to his second death sentence. In *People v. Anderson*, the California Supreme Court struck down capital punishment as a violation of the state Constitution’s ban on cruel and unusual punishment. The ruling appeared to end the long struggle over capital punishment, but the fight over the death penalty was only just beginning.

The history of the death penalty is a history of ebbs and flows. At certain points in history, support for the death penalty fell and abolition forces rose. At other times, support for the death penalty rose with abolition forces seemingly helpless. The start of 1972 appeared to be the ultimate ebb, in California and the nation. California's state Supreme Court abolished the death penalty in *Anderson* and the U.S. Supreme Court looked poised to do the same later that term in *Furman v. Georgia*. As hindsight reveals, in both California and the nation—but especially in California—1972 was actually the start of the most recent period of rising support for the death penalty. This thesis examines that rising support for capital punishment through changes in California's death penalty law between 1972 and 1978.

As with all ebbs and flows of death penalty support, framing was important. Framing is a political science concept that means: “differing perspectives on some event or issue.” In relation to political issues, framing dictates: “elite rhetoric and news media coverage shape mass opinion” in a “dynamic, circumstantially bound process.” Just as the innocence frame explains the ebb in support for capital punishment in the twenty-first century, two frames explain the

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reemergence of the death penalty in California in the 1970s. The “law-and-order” framework—which explained Reagan’s breach of California’s death penalty moratorium—and the “tough-on-crime” framework explain the revival of California’s capital punishment system in the 1970s.

Following the Anderson ruling in 1972, supporters of the death penalty sponsored a ballot initiative, Proposition 17, to reinstate capital punishment in California. The next year, pro-death penalty forces in the legislature proposed SB 450 to implement a new, mandatory death penalty law. In 1977, pro-death penalty forces introduced SB 155, in order to meet the standards set by the U.S. Supreme Court in Gregg v. Georgia. Finally, in 1978, proponents of capital punishment sponsored another ballot initiative, Proposition 7, which expanded the types of capital crimes and increased the penalties for non-capital homicides. This thesis focuses on those four changes in California’s capital punishment system in the 1970s. The thesis will argue that the shifts in California’s death penalty law reflects the declining influence of the “law-and-order” framework and the rising influence of the “tough-on-crime” framework.

Analyzing the arguments behind the death penalty’s resurgence in 1970s California is important for two reasons. First, understanding pro- and anti-death penalty arguments is beneficial to both sides. In the context of 1970s California, supporters of capital punishment can understand the frames that led success, and opponents can learn from their failures. Second, a

11 In addition to an abstract decline in support for capital punishment, juries are less likely to impose the death penalty in the twenty-first century because of the innocence frame. Frank R. Baumgartner, Suzanna Linn, and Amber E. Boydstun, “The Decline of the Death Penalty: How Media Framing Changed Capital Punishment in America,” in Winning with Words: The Origins & Impact of Political Framing, ed. Brian F. Schaffner and Patrick J. Sellers (New York, NY: Routledge, Taylor and Francis, 2010), 159.

12 In Gregg, the United States Supreme Court lifted the national moratorium on capital punishment imposed by Furman v. Georgia. The Supreme Court also issued constitutional guidance on death penalty schemes. It ruled that there must be a mechanism to separate the worst of murders because the death penalty can only be applied to that category of murders. Because of Gregg’s influence, the case signals the start of the modern era of capital punishment in the U.S. Schwab, “The History of the Death Penalty in California,” 13.

13 In order to determine which murders are the worst, per Gregg, states developed a number of special circumstances that had to be present for a murder to be death-penalty eligible. Proposition 7 increased the number of special circumstances in California, increasing the number of cases in which the death penalty could be applied. Schwab, “The History of the Death Penalty in California,” 13.

14 For a complete timeline, see Appendix 1.
broad and growing political consensus believes the tough-on-crime framework’s policy consequences have harmed people and the U.S. broadly. By learning about the causes of those policies, the U.S. can avoid similar mistakes in the future.

**The “Law-and-Order” Framework versus the “Tough-on-Crime” Framework**

In order to conceptualize the transition from the law-and-order framework to the tough-on-crime framework, it is important to understand the terms “law and order” and “tough on crime.” In this thesis, the terms have specific meanings based on their historical contexts. At its most basic level “law and order” refers to the phrase on which Richard Nixon ran for president in 1968. In his (in)famous speech accepting the 1968 Republican nomination for president, Nixon referred to a nation “plagued by unprecedented lawlessness.”

Nixon was referring both to protests associated with the Civil Rights Movement and a rise in more traditional crimes. The denigration of the Civil Rights Movement was intentional. It was part of Nixon’s “Southern strategy” that aimed to win over white working class voters, primarily in the South, through racism. At its heart, law-and-order politics was about rising crime and racially-coded appeals.

Generally, “tough on crime” refers to a related, but different phenomenon. The term refers to the increased punitiveness across the legal system that started in the 1970s but clearer in policies from the 1980s and 1990s. Although different authors call “tough on crime” different names—such as the “punishment imperative,” the “new Jim Crow,” or “‘get-tough’ policy making”—this thesis uses the term as shorthand for the ideology that drove mass incarceration.

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16 For a succinct comparison of these two terms, see Appendix 2.
18 “Richard Nixon: Address Accepting the Presidential Nomination at the Republican National Convention in Miami Beach, Florida.”
the sharp rise in prison populations in the 1980s and 1990s.\textsuperscript{20} Traditionally, scholars designate President Ronald Reagan’s 1980s War on Drugs and the 1990s rise of mandatory minimums and truth-in-sentencing legislation as the key mass incarceration policies. Mandatory minimums set a minimum sentence for certain crimes. Truth-in-sentencing legislation requires a certain percentage of a sentence to be served before an offender is eligible for parole.\textsuperscript{21}

The traditional timeline for the tough-on-crime framework demonstrates a noteworthy difference between law and order and tough on crime. “Law and order” was a phrase used at the time. “Tough on crime,” however, is a retroactive label coined by scholars. Additionally, this thesis looks at the 1970s, a time period that is not traditionally associated with the tough-on-crime framework. This thesis argues that evidence of its relevance appears earlier than many other analyses acknowledge and, therefore, extends the concept back to the 1970s.

This thesis will argue that key aspects of both the law-and-order and tough-on-crime frameworks were present in the 1970s debate over the death penalty in California, so it is important to understand those traits in more detail. The law-and-order framework focuses on fear of crime and the need to deter crime. By contrast, the tough on crime framework focuses on increasing the overall punitiveness of the criminal justice system. Both frameworks also used racially coded language, but groups’ willingness of use “racial harm” arguments differed.\textsuperscript{22} The law-and-order framework operated during the Civil Rights Movement, a time in which the public and the legal system still recognized the impact of racism and accepted racial harm arguments.

The legal system was not colorblind. When the tough-on-crime framework rose, a colorblind \begin{flushright}
\textsuperscript{21} Clear and Frost, \textit{The Punishment Imperative}, 31.
\textsuperscript{22} “Racial harm” arguments focus on racially disparate outcomes. The phrase is borrowed from: Taylor, \textit{From #BlackLivesMatter to Black Liberation}, 52.
\end{flushright}
approach to the law dominated popular thinking, especially among whites, so the legal system and the public did not recognize racial harm arguments. Finally, the law-and-order framework was not accepted across the ideological spectrum; liberals rejected law and order and liberal politicians fought against law-and-order rhetoric. In contrast, the tough-on-crime framework was broadly accepted across the ideological spectrum, so liberal politicians resisted less. The introduction will explore each of these issue areas in more depth before discussing historiography specifically related to California and the death penalty in the 1970s.

The first distinction, between the deterrence-based model of the law-and-order framework and the increased punitiveness of the tough-on-crime framework, is straightforward. For Nixon, law and order meant a need to restore calm to the country after a crime wave, which included more protests as well as a rise in more traditional crimes.23 The problem was a sharp increase in crime, so the solution would be deterrence of that crime. People, both whites and minorities, feared rising crime. The law and order framework played on those fears.24 References to people’s fear of crime and calls for deterrence reflect a law-and-order framework. By contrast, the tough on crime framework focused on making the criminal justice system more punitive. For example the 1980s War on Drugs made the criminal justice system more punitive by creating federal laws for drug possession.25 In the 1990s, increasing the length of sentences through mandatory minimums and truth-in-sentencing laws also reflected a tough-on-crime framework. It further made the criminal justice system more punitive by making prison conditions harsher.26

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Changes in California’s death penalty law in the 1970s also reflected these aspects of a tough-on-crime framework. These actions differentiate law-and-order and tough-on-crime approaches.

Both these frameworks also used racialized arguments, but the response to those arguments differed. Initially, white Southern politicians used the language of law and order to challenge the Civil Rights Movement.\(^27\) During the 1968 campaign, Nixon adopted what became known as the ‘‘Southern strategy.’’ It was an attempt to appeal to Southern Democrats who did not like the Democratic party’s pro-civil rights stance. As explained by John Ehrlichmann, the Special Counsel to the President under Nixon, part of that strategy included using non-explicit anti-Black appeals.\(^28\) H.R. Haldeman, Nixon’s chief of staff, explained Nixon ‘‘emphasized that you have to face the fact that the whole problem is really about the blacks. The key is to devise a system that recognizes this while appearing not to.’’\(^29\) While the Southern strategy worked among white Southern Democrats, it did not work among people who were more liberal on civil rights. Liberals still discussed race and racial disparities during the law-and-order era; by the late 1960s, civil rights leaders more prominently argued for race-based solutions to racial disparities.\(^30\) The legal system also still accepted racial harm arguments, even when plaintiffs could not prove racially discriminatory intent. For example, in 1971, the Supreme Court ruled in \textit{Griggs v. Duke Power} that racial outcomes, not just intentions, mattered.\(^31\) Although that case involved employment discrimination, the general concept extended across all areas of law, including criminal justice policy. As a result, for this thesis, the law-and-order framework does not prohibit anti-death penalty forces from making racial harm arguments.

\(^{27}\) Beckett and Sasson, \textit{The Politics of Injustice}, 47.

\(^{28}\) Beckett and Sasson, \textit{The Politics of Injustice}, 54.

\(^{29}\) Taylor, \textit{From #BlackLivesMatter to Black Liberation}, 56.

\(^{30}\) Earlier they wanted a legal system that did not act based on racial difference. Ian Haney López, \textit{Dog Whistle Politics: How Coded Racial Appeals Have Reinvented Racism and Wrecked the Middle Class} (New York: Oxford University Press, 2014), 81.

The tough-on-crime framework also included racially charged language, but both sides tacitly agreed to not use racial harm arguments as part of a broader shift to a colorblind legal system. Colorblindness is the idea that race no longer affects how people are perceived or treated in the U.S. In society, according to Ian Haney López, the idea of colorblindness means that there is an “etiquette” against discussing race, an etiquette that extends to almost all whites regardless of their political views. In a colorblind legal system, formal equality is enough. “The absence of racism in the law meant that African Americans could not claim racial harm.” As a result, the legal system eliminated racial differences by limiting race-based solutions and by ignoring racially disparate impacts. In *University of California v. Bakke* (1978), the U.S. Supreme Court limited affirmative action by restricting the use of race in such programs. Then, in *McClesky v. Kemp* (1987), the U.S. Supreme Court ruled that racially disparate impact alone could not prove a law was racially discriminatory. Importantly *McClesky* discussed the criminal justice system; colorblindness applied in that area of the law too. Colorblindness meant it was not seemly to make racial harm arguments because discussing racial difference was taboo.

Despite the existence of the colorblind system, the tough on crime framework also included racial undertones. First, as president, Reagan often used crime as a way to point towards dangerous minorities. He, for example, described criminals as “‘predators.’” Second, many of the policies of tough on crime, especially the War on Drugs, had a racially disparate impact that their designers knew about or should have known about. For instance, even though statistics show whites represent the majority of drug dealers and users, three-quarters of those in prison for

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33 Haney López, *Dog Whistle Politics*, 77-78.
drug crimes are racial minorities. The well-known sentencing disparity between crack cocaine and powder cocaine (for many years 100 to 1) illustrates these racial disparities in sentencing. In the 1980s, lawmakers knew or should have known that African Americans used crack more and whites used cocaine more. When the Reagan administration started the War on Drugs, it used a media campaign to highlighted the problem of crack in inner cities. The media inundated the public with images of African-American “‘crack whores,’ ‘crack babies’ and ‘gangbangers.’” As a result, lawmakers and the public associated African Americans with crack. Therefore, they knew or should have known that African Americans used crack more and that the sentencing disparity between crack and powder cocaine would have racially disparate consequences. That demonstrates the racial undertones of the tough-on-crime framework.

The difference between the law-and-order framework and the tough-on-crime framework was: no one challenged tough-on-crime policies for racial disparities because of colorblindness. As a result of the rise of colorblindness, the public was supposed to believe formal equality was enough. Making arguments about racial disparities in the legal system would have undermined that belief. Therefore such arguments were taboo, and the U.S. Supreme Court’s rulings in Bakke and McClesky reinforced that inhibition. For this thesis, when the tough-on-crime framework was present, actors, mainly opponents of the death penalty, did not make racial harm arguments.

Finally, the dynamics of political opposition were different for the law-and-order and tough-on-crime frameworks. Liberals actively opposed the law and order framework. In the late 1960s and early 1970s, they argued that crime was the result of poor social conditions, which stood in sharp contrast to conservative law-and-order arguments that blamed crime on the

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41 Alexander, *The New Jim Crow*, 50
permissiveness of African-American culture aided by the Civil Rights Movement.\textsuperscript{42} By contrast, liberals did not strongly resist, and even later actively supported, the tough-on-crime framework. The “collapse” of liberal resistance to tough-on-crime policies, especially the War on Drugs, was a key event in the rise of mass incarceration.\textsuperscript{43} Many people have argued that electoral incentives were a key part in the demise of liberal resistance.\textsuperscript{44} Liberals and the Democratic Party, which no longer included Southern Democrats, then became key supporters of tough-on-crime policies.\textsuperscript{45} The 1994 crime bill, pushed by Democratic President Bill Clinton and Senator Joe Biden, included harsher sentences, via a three strikes provision, and truth-in-sentencing provisions.\textsuperscript{46}

For this thesis, the shift from the law-and-order framework to the tough-on-crime one will include a drop in liberal and Democratic resistance to the death penalty.

Combining those deeper understandings of the law-and-order and tough-on-crime frameworks, three changes reflect the shift between the two frameworks. First, it reflects a shift from focusing on deterrence to focusing on increasing the criminal justice system’s punitiveness. Second, opponents of the death penalty no longer made racial harm arguments. Third, opposition to the death penalty declined among liberal and Democratic politicians and voters. Observing those three changes in the rhetoric surrounding California’s capital punishment policy in the 1970s will provide support for this thesis’s core argument that death penalty policy demonstrates the shift from the law-and-order framework to the tough-on-crime framework.

One final important term in this thesis is “humanistic.” The term humanistic to describe a certain type of anti-death penalty argument. Specifically, humanistic anti-death penalty

\begin{footnotesize}
\textsuperscript{42} Alexander, \textit{The New Jim Crow}, 45. \\
\textsuperscript{43} Alexander, \textit{The New Jim Crow}, 55. \\
\textsuperscript{44} See Alexander, \textit{The New Jim Crow}, 55. and Haney López, \textit{Dog Whistle Politics}, 32. \\
\textsuperscript{45} Not all liberals or Democrats supported the policies behind mass incarceration. Some liberals and Democrats opposed those policies, and they should not be forgotten. With that caveat in mind, the argument still holds that liberals and Democrats reduced their resistance significantly between law and order and tough on crime. \\
\end{footnotesize}
arguments focus on the morality and fairness (or lack thereof) of capital punishment. The
definition is adapted from a work on media framing that classified seven themes in death penalty
arguments: “efficacy, morality, fairness, constitutionality, cost, mode of execution, and
international concerns.” Typical morality arguments might argue the state should not execute
its own citizens. Fairness arguments might oppose the death penalty based on racial disparities in
death sentences. Humanistic anti-death penalty arguments stand in contrast to other popular
arguments against the death penalty such as: the death penalty is unconstitutional cruel and
unusual punishment, the death penalty costs more than life imprisonment, or the death penalty
does not stop murderers. The term humanistic only labels morality or fairness arguments.

California’s capital punishment initiatives in the 1970s did not exist in isolation. In fact,
the initiatives’ continued importance comes from the context in which they were passed.
Proposition 17, the 1972 initiative, played an important role in the end of the national
moratorium on the death penalty. In Gregg v. Georgia, the Supreme Court case that marked the
end of the moratorium, the controlling opinion cited Proposition 17 as evidence that the people
did not believe capital punishment violated common standards of decency. In the modern era of
capital punishment, the 1978 initiative represents one of the few examples of voter support for a
death penalty referendum or initiative anywhere in the U.S. As a result, investigating the
initiatives allows for a deep-level analysis of popular opinions on the death penalty. Most
analyses of popular support for capital punishment are exclusively quantitative. Examining the
initiatives, therefore, broadens the understanding of popular support for the death penalty.

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48 These arguments represent the constitutionality, cost (or utilitarian), and efficacy frames. The mode of execution
frame usually is paired with the constitutionality frame to say the death penalty is not constitutional because the
method of execution causes death. Finally, the U.S. seems impervious to the international concerns frame, so it is
not widely employed.
Historiography

Just as California’s death penalty policies in the 1970s did not exist in isolation, this thesis does not exist in isolation. Some literature includes a singular event in the story as part of a broader argument focused on a topic other than capital punishment. Other scholars of aspects of the topic make an argument about California or the death penalty, but not both. Finally, many writings that discuss capital punishment in California give only part of the story; they cover the beginning, middle, or end but not the entire time period, thus missing crucial parts of the narrative. For example, Rebel and a Cause, about Caryl Chessman, only covers through 1974. Only one source examines the entire time period between 1972 and 1978, but that source does not make an argument but rather simply states the facts.

Some analysis discusses California and capital punishment as part of a broader argument about other topics. Zachary Shemtob’s dissertation, “Supreme Convolution,” focuses on judicial behavior by analyzing court cases and judicial archives. He only mentions a sharp increase in support for capital punishment following the 1972 Furman decision, which instituted a capital punishment moratorium. Shemtob cites the 1972 initiative that amended California’s state constitution to allow for capital punishment, which passed by a two to one majority, as evidence of the increase in support. Still even a minor mention such as Shemtob’s can include important information. For example, Shemtob hypothesizes that Nixon’s law-and-order platform contributed to the increase in support for capital punishment, but offers little evidence to support his claim. Despite the lack of conclusive evidence, Shemtob’s linkage of law and order to the 1972 California initiative indicates a reasonable basis for this thesis.

52 Shemtob, “Supreme Convolution,” 16.
Some scholars focus on either California or capital punishment. Kathleen Auerhahn’s 2000 dissertation “Dangerousness and Incapacitation,” discusses Proposition 7—the 1978 initiative that increased the number of circumstances under which capital murder could be charged—in the context of a broader discussion of initiatives in California. To inform her discussion, Auerhan uses law review and criminology journal articles as well as legislative reports. Specifically, she argues that California voters used initiatives as a vehicle to get tough on crime.53 While Auerhahn focuses on criminal justice initiatives more broadly, her brief linkage between Proposition 7 and the tough-on-crime framework provides support for my hypothesis, at least during the waning stages of California’s capital punishment policy unrest.

Other sources that discuss California and the death penalty are part of a broader story about the changes in capital punishment legislation across the country in the 1970s. Hugo Adam Bedau’s article, “Gregg v. Georgia and the ‘New’ Death Penalty,” is such a source. Bedau uses court cases to discuss the importance of the 1972 initiative to reinstate capital punishment; the U.S. Supreme Court noted the initiative in Gregg v. Georgia, which nationally reinstated the death penalty. For the Supreme Court, the California initiative demonstrated that the death penalty did not violate standards of decency, a criterion that federal courts had to meet to reinstate the practice.54 Bedau used California’s initiative as part of his broader argument that the U.S. Supreme Court reinstated the death penalty because of the public’s desire to be tough on crime.55 While the main argument does not focus on California and capital punishment, it does bolster my thesis in one aspect; the 1972 initiative is tied to tough on crime politics, and attempts to reinstate capital punishment can reflect that.

The third group of sources focuses more specifically on capital punishment in California, but they do not tell the entire story between 1972 and 1978. Some focus only on the beginning or the end. Others examine only one perspective, such as the justices’ perspective. But other perspectives are necessary to fully understand the change in capital punishment policy in California in the mid-1970s. Two chapters of the book *Invitation to Execution: A History of the Death Penalty*, for example, do not capture the entire story. The second part’s introduction, which exclusively relies on secondary sources, narrates changes in death penalty policies from the abolition of the death penalty in *People v. Anderson* through its legislative restoration in 1973. It discusses the reactions to the *Anderson* decision and charts death penalty proponents’ mobilization for the 1972 initiative and the 1973 law. According to Bakken’s work, voters thought the death penalty would help restore law and order by deterring criminal actions. The link to law and order supports this thesis’s argument, but Bakken fails to holistically consider California’s evolving capital punishment policy. The chapter only covers two years, not six, and Bakken predominantly includes the statements of legislative and executive branch politicians. It does not tell the story of ordinary citizens nor of judges.

Thomas Bojorquez’s chapter, “Means of Death” also fails to tell the whole story. Bojorquez uses court cases and *Los Angeles Times* articles to examine the death penalty in California from 1967 (the last time California held an execution before *Anderson*) to the 1977 law that reinstated the death penalty after *Gregg*. The chapter focuses on the methods of execution but reveals some reasons behind changes in the state’s death penalty policy.

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Supporters of the 1972 initiative worried that Charles Manson would soon be eligible for parole.\(^{59}\) Supporters of the 1978 initiative invoked that same fear.\(^{60}\) This chapter does not mention the 1978 initiative, so it is not authoritative on the changes in policy.

Another source that discusses California and the death penalty is Theodore Hamm’s book, *Rebel and A Cause*. Hamm focuses on Caryl Chessman, a man who opposed the death penalty from death row, mainly through newspaper articles supplemented with criminology articles and legislative reports. Through Chessman, he investigates California’s death penalty more broadly between 1948 and 1974.\(^{61}\) Hamm argues that Reagan’s support for capital punishment was part of a law-and-order platform. “For Reagan, capital punishment insured ‘self-defense for society.’”\(^{62}\) Hamm, however, ends the story in 1974, so he does not give an authoritative narrative on California’s death penalty policy evolution. *Rebel and A Cause*’s conclusion provides support for this thesis by discussing post-1974 developments and tying them to tough-on-crime politics. Specifically, Hamm notes that Democrats in the 1990s acquiesced to Republicans and also tried to become tough on crime by supporting the death penalty.\(^{63}\) This thesis can help flesh out the conclusions in Hamm’s work.

Sam Kamin’s 2000 dissertation on “The death penalty and the California Supreme Courts” mentions the whole history from *Anderson* through Proposition 7, but it briefly gives the history and reports only the facts. His sources consist of court cases and statutes, so there is little direct analysis of the events.\(^{64}\) For example, Kamin states Proposition 17 was the direct result of


\(^{61}\) Hamm, *Rebel and A Cause*.

\(^{62}\) Hamm, *Rebel and A Cause*, 148-149.

\(^{63}\) Hamm, *Rebel and A Cause*, 168.

\(^{64}\) Sam Kamin, “The Death Penalty and the California Supreme Courts: Politics, Judging and Death” (Ph.D., University of California, Berkeley, 2000), 20-33.
Anderson but does not explain why California voters wanted to restore the death penalty. 65

Kamin also does not focus on the whole picture. Kamin’s dissertation focuses on California’s death penalty as a case study in the freedom appellate court judges have in making decisions. 66

Howard Schwab’s 1981 article, “The History of the Death Penalty in California,” similarly fails to analyze the reasons for the changes from 1972 to 1978. It uses court opinions to offer a complete history of the court cases, initiatives, and legislative action from the time period. 67 Yet, despite its authoritative description of the events, Schwab’s article does not venture far into the area that will be covered by this thesis. The article does not give any reasons why the developments occurred the way that they did. As a result, it cannot serve as a useful primary source. In addition, the author was himself involved in many of the legal decisions, so he is not removed, as is a historian generally.

Ultimately this thesis tells the most complete, thus far, story of California’s capital punishment policy upheaval between 1972 and 1978. Past literature has focused on parts of the story, but it has ultimately been limited both in its chronology and the actors it has followed. This thesis, in contrast, will seek to include all three branches of government, the judicial, legislative, and executive, and as well as the perspectives of average citizens. It includes judges through the relevant court decisions and executive branch officials and legislators through their public comments. Arguments for and against the initiatives will provide insight into the views of average citizens. Sources for those arguments include: voter information guides and letters to the editor and opinion pieces in newspapers. This thesis tells the whole story chronologically, from 1972 to 1978. It argues that the great upheaval in California’s capital punishment policy in the 1970s was part of a transition from the law-and-order framework to the tough-on-crime one.

The first chapter explores the influences of the law-and-order framework during the 1972 initiative, Proposition 17, campaign. The second chapter serves as a bridge between the two initiatives. It examines the waning influence of the law-and-order framework and the rising impact of the tough-on-crime framework through the debates on the 1973 and 1977 death penalty laws, SB 450 and SB 155. The third chapter investigates the increased prominence of the tough-on-crime framework in the 1978 initiative, Proposition 7, campaign. The conclusion examines how California became a leader in tough-on-crime politics and the efforts it has taken to reverse the impact of those policies.
Chapter 1: Allowing Death:
Proposition 17’s Amendment to the State Constitution to Allow for Capital Punishment

“[T]he people should express their opinion through a constitutional amendment.”
- California Governor Ronald Reagan

For fifty years, opponents of capital punishment in California tried to abolish the death penalty before achieving their goal via the California Supreme Court’s 1972 decision in *People v. Anderson*. But proponents of the death penalty took less than a year to pass a constitutional amendment to overturn *Anderson* and reinstate the practice. Capital punishment supporters were arguing for reinstatement before the ink on the decision had even dried, revealing their intent to move at a breakneck pace. Governor Reagan’s statement from February 19, 1972, a day after the state Supreme Court announced the *Anderson* decision, called for a constitutional amendment to restore the death penalty; the same day state Senator George Deukmejian “had already proposed” to place the issue on the ballot via the legislature. Less than a week later, the California Correctional Officers Association announced it would try to qualify a constitutional amendment to reinstate capital punishment for the ballot via the initiative process. Within a week, supporters of capital punishment had established two methods to reinstate the death penalty.

Although the California Supreme Court had just abolished capital punishment in the state and the United States Supreme Court was considering the issue during its term, the fight over the death penalty had just begun. With that fight came a variety of arguments both for and against...
the proposal that would become Proposition 17. Supporters of the death penalty focused their arguments on deterrence, demonstrating the influence of the law-and-order framework. Opponents of the death penalty made many different types of arguments. At times, they relied on the supports’ deterrence-based framing, revealing the influence of the law-and-order framework. However, abolitionists who sought to protect their victory also relied on the humanistic arguments that led to Anderson. This chapter will investigate the arguments in favor and against Proposition 17 and the death penalty more broadly following Anderson. It will demonstrate that, regardless of the occasionally more humanistic tendencies of anti-death penalty arguments, both sides relied heavily on arguments about whether capital punishment was a deterrent. This reliance reveals the influence of the law-and-order framework; the strength of the framework forced opponents of capital punishment to argue it was not a deterrent.

**Early Arguments- From Anderson to Proposition 17’s Ballot Qualification**

The fight over capital punishment’s restoration started the day after the Anderson ruling, February 19, 1972. It transformed into the fight over Proposition 17 when the initiative qualified for the ballot in June. As the fight began, the arguments both sides would make for the duration of the campaign became clear. Proponents of capital punishment decried the negative effect on public safety; the most powerful deterrent against crime was gone. Anti-death penalty forces revealed their dual approaches to the debate; on one hand they relied on more humanistic sensibilities, but on the other they felt forced to rely on the law-and-order framing of death penalty proponents because those arguments were pervasive.

The pro-capital punishment group’s reliance on law-and-order-based deterrence arguments started with the highest official in the state. On the same day that he called for a constitutional amendment to overturn Anderson, Governor Reagan said eliminating the death
penalty was “‘one more step toward totally disarming society in its fight against violence and crime.’” The death penalty can only help society fight crime if it deters crime, so Reagan’s statement relied on the law-and-order framework. Los Angeles prosecutor Vincent Buglios, who prosecuted Charles Manson and his followers, worried that a person like Manson would be paroled a few years after committing his crimes without the death penalty. The implication of such a statement, as will become apparent by other statements of pro-death penalty voices, was that life and life without the possibility of parole sentences did not deter criminals. With the death penalty, there could be another Manson. Because the focus is on deterrence, Buglios’s statement also relied on law-and-order rhetoric.

Opponents of capital punishment revealed a dichotomy in their arguments that lasted the entire campaign. On the one side were Anthony Amsterdam, the attorney who argued against capital punishment before the state Supreme Court in Anderson and in front of the U.S. Supreme Court in Furman v. Georgia, and Assemblyman Alan Sieroty, who introduced a bill in the state legislature to abolish capital punishment at the beginning of 1972. They praised Anderson for asserting that all life is valuable. Their argument about the inherent dignity of human life represented opponents’ humanistic arguments. However, anti-death penalty forces also felt the need to argue within the law-and-order framework. For example, Pat Brown, a Democratic former governor of California and father of future California governor Jerry Brown, argued that

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73 “Reagan Calls It ‘Mockery.’”
74 Findley, “Reaction to Court’s Ruling.”
75 There is no evidence that anti-death penalty forces were willing to get rid of parole in murder cases in 1972, but the issue was important in the fight over the 1977 death penalty law in the state legislature.
77 Findley, “Reaction to Court’s Ruling.”
abolishing the death penalty deterred crime. “‘Quickness of punishment rather than severity of punishment deters serious crime.’”78 Thus, the law-and-order framework influenced both sides.

A Two-Pronged Approach - The Legislative and Petition Approaches

For two and a half months following Anderson, pro-capital punishment forces followed a two-pronged approach to qualifying a constitutional amendment for the November 1972 ballot. State Senator Deukmejian attempted to pass a constitutional amendment to reinstate the death penalty via the legislature, and the California Correctional Officers Association gathered signatures to qualify for the ballot via the initiative process. During that time, pro-death penalty public officials continued making deterrence-based arguments, as they had immediately after Anderson. Anti-capital punishment commentators also made similar arguments. They made both humanistic arguments and relied on supporters’ law-and-order framing. However, the types of people making the arguments were fundamentally different. Public officials supported the death penalty, but African-American community leaders were the most vocal opponents. Regardless of who made the arguments, the influence of a law-and-order framework was clear.

The prison guards supporting a constitutional amendment via the initiative process believed the death penalty was key to their physical protection. Moe Camacho, president of the California Correctional Officers Association announced the start of the initiative drive by arguing, “‘There is absolutely no doubt that capital punishment is a deterrent to crime,’” especially against prison guards.79 This view was not unique to union leaders. One prison guard, when asked after his Teamsters local announced its support for the initiative drive, said the abolition of the death penalty “‘removed the last vestige of any possible hope of deterring or

79 “Prison Guards Petition.”
protection the law enforcement officer in general and the correctional officer in particular from ruthless killers.’”

The unitary focus on the death penalty as a deterrent revealed that the prison guards pushing for the initiative relied on the law-and-order framework.

Public officials who supported the legislative route for a constitutional amendment on the ballot also relied on arguments about deterrence. State Senator Deukmejian argued the death penalty “‘is the one form of punishment that has proven to be an effective deterrent to the crime of murder.’” California Attorney General Evelle Younger also supported the death penalty for law-and-order reasons. A week after the Anderson decision and in response to the large amount of mail sent to his office, Younger said, “‘It is a fact that the level of fear in California now is higher than it has been in 30 years.’” Younger’s statement revealed a fear of rising crime that underlay the law-and-order framework. Finally, Governor Reagan continued his defense of the death penalty as a deterrent but in stronger terms. When Reagan announced his support for the movement to place a constitutional amendment on the ballot, he argued that the death penalty was the only effective deterrent. Reagan argued that life without the possibility of parole “‘doesn't work and it never has worked.’”

Supporters of capital punishment’s absolutist deterrence-based argument revealed the influence of the law-and-order framework.

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80 In general the guards thought that a prisoner with a life term had nothing to lose by attacking a guard if there was no death penalty; the incarcerated individual would just be given another life term. With the death penalty, there was an additional cost to attacking a prison guard, even for a life-term prisoner. “Guards Vow Fight For Death Penalty,” San Francisco Chronicle, March 19, 1972, San Francisco Chronicle Microfilm Reel Mar. 11-20, 1972, Library of Congress: Newspaper and Current Periodical Reading Room.


83 Earl C. Behrens, “Reagan for Death Penalty Initiative,” San Francisco Chronicle, March 1, 1972, San Francisco Chronicle Microfilm Reel Mar. 1-10, 1972, Library of Congress: Newspaper and Current Periodical Reading Room. The answer to whether Reagan’s statement is true is complex. Until the late 1970s, most states used indeterminate sentencing. With indeterminate sentencing, an offender did not have to serve a set amount of time; release was dependent on one’s behavior within prison and rehabilitation. As a result, a sentence of life without parole as people understand the term in the twenty-first century did not exist. As a result, Reagan was correct that few to no people died of natural causes in prison; people who committed murderers were among the general population and could
Opponents of capital punishment likewise relied on the law-and-order framework during this early stage, despite having humanistic arguments at times. It is important to note that the groups making arguments against capital punishment differed from those making arguments for the death penalty. While politicians and professional organizations (e.g. the prisons guard union) made pro-death penalty arguments, people writing in an African-American newspaper, the *Los Angeles Sentinel* led arguments against capital punishment. There are three possible explanations for why the *Sentinel* was the main anti-death penalty outlet. First, it is possible that anti-death penalty politicians and professional organizations were focused on the U.S. Supreme Court. Anthony Amsterdam, the lawyer who argued in front of the California Supreme Court, was also set to argue in front of the U.S. Supreme Court in *Furman v. Georgia.* Furman represented an opportunity to abolish the death penalty throughout the U.S., so it made sense to focus resources on that opportunity rather than focus on a proposal that was not even qualified for the ballot. This potential option is furthered by the fact that Deukmejian himself said a decision by the U.S. Supreme Court to abolish the death penalty would make any push for a constitutional amendment useless. A second possible explanation is that the media did not cover death penalty opponents as much as they covered supporters. The *Sentinel* was not the only commentator against the death penalty, just the main source. The Democratic leader in the state Senate, George Moscone, said people should respect the Court’s view, and the San Francisco Bar...
Association made a similar point. It is possible that other anti-death penalty politicians and professional organizations voiced their opposition to the death penalty, but the mainstream media did not give them as much attention. A third possible explanation is that the decision to abolish the death penalty was more momentous for the African-American community. A Sentinel article from the week following the Anderson decision supports this third possibility. The article argued that capital punishment’s abolition “represented a broad victory for black people; similar to the 1954 federal school desegregation action, it is the culmination of years of struggle.” Historical circumstances reinforce this third possibility. First, African-Americans were disproportionately sentenced to death, an argument regularly employed by opponents of capital punishment. Second, many scholars have argued that capital punishment perpetuates the same type of racial violence as lynching perpetuated and as slavery before that. The Sentinel was the main anti-death penalty actor at the time likely because of a combination of all three of these reasons.

Whatever the reasons, the articles and opinion pieces in the Sentinel revealed the influence of both humanistic arguments and the law-and-order framework on death penalty opponents. One article humanistically argued that the death penalty targeted the lower classes. The “‘have-nots’” had always been “the chief victims” of capital punishment. Another article in the Sentinel from the same time argued that the death penalty was not a deterrent. Specifically, the author questioned why prison guards were pushing for a death penalty restoration because more prison guards were killed in California when it had the death penalty than in Michigan,

which did not have capital punishment. The article implied the death penalty did not deter crime against prison guards. Since the article focused on deterrence, it revealed the impact of the law-and-order framework. As a final note, the argument, like many of the statistics-based arguments from both sides of the debate, was flawed; correlation does not equal causation, so factors other than the presence or absence of the death penalty could have explained the difference in the murder rate of prison guards.

*A Victory and a Defeat*

By early May, supporters of capital punishment had made their arguments and opponents of capital punishment were anxiously awaiting the U.S. Supreme Court’s decision in *Furman v. Georgia*, hoping that it would abolish the death penalty nationwide and thereby make the push for a constitutional amendment moot. During the first week of May, the California state Senate defeated Deukmejian’s legislative attempt to qualify the constitutional amendment on death penalty restoration for the general election ballot. Surprisingly, the Democrat-controlled chamber only fell two votes short of achieving the two-thirds threshold needed. The measure failed 25 to 13, with 16 Republicans and nine Democrats in favor and two Republicans and 11 Democrats opposed. The vote showed that nearly all Republicans supported the death penalty while Democrats were close to evenly split; moderate Democrats appeared to support capital punishment. From that point on, the pro-death penalty forces focused their efforts on the petitions to qualify the constitutional amendment for the ballot.

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91 I am noting this instance because it is the first time a correlation does not equal causation flaw occurs. While there will be other statistics cited in deterrence arguments that have the same flaw, I will not point them out to conserve space and because the reader already knows how to identify such flaws based on my identification of this flaw.


Perhaps because they had already made their pitch earlier, the main efforts between early May and early June, when the petitions were due, almost exclusively involved rhetorical gestures rather than substantive arguments. Days after Deukmejian’s effort failed in the legislature, the California Correctional Officers Association boasted it already had 100,000 signatures, roughly 20% of necessary total. They also boasted the organization was not having difficulty gathering signatures.\(^4\) By mid-May, Governor Reagan was recruited to take part in the rhetoric. When asked if he would sign a petition, Reagan said he would because “his wife, Nancy, ‘greeted me with one last night.’”\(^5\) While this scene was mainly rhetorical since Reagan had already come out in support of the initiative drive, he reiterated his belief the death penalty’s deterrent capabilities.\(^6\) Capital punishment supporters did not waiver from the law-and-order framework. Finally, by late May, the lone dissenting judge from Anderson, Justice Marshall McComb, was circulating petitions to restore the death penalty. McComb said he was circulating petitions because he could not sign them himself; it would force his recusal in future state Supreme Court decisions on the death penalty.\(^7\) On June 9, the day petitions were due, supporters submitted over one million signatures in support of placing the constitutional amendment on the ballot. Not only was that amount double the number of required signatures, it also represented, at the time, the most signatures ever obtained to qualify an initiative.\(^8\) Less than three weeks later, the initiative that would become Proposition 17 formally qualified for the ballot.\(^9\)


\(^6\) Doyle, “Reagan on Death Penalty.”


A Debate Without a Number- Developments During the Summer Months

Four days after the constitutional amendment to restore the death penalty in California qualified for the ballot, the U.S. Supreme Court announced its long-awaited decision in *Furman v. Georgia*. The Court ruled five to four to strike down all death penalty systems in the United States, but only three of the five justices in the majority found the death penalty unconstitutional in all circumstances. To add further to the confusion surrounding the ruling, each justice wrote a separate opinion.100 Before the ruling, a U.S. Supreme Court decision to strike down the death penalty was supposed to end the movement for an amendment to the California’s state Constitution. However, because of *Furman*’s lack of clarity, the decision set off a summer-long fight over whether the initiative that would become Proposition 17 could stay on the ballot.101

As if anticipating the complaints of death penalty opponents, capital punishment supporters sought to defend the initiative following the ruling. Governor Reagan and law enforcement groups across California “refused to concede… that the death penalty is, in fact, dead.”102 Supporters of the capital punishment thought *Furman*’s ban on the death penalty was not absolute. A week after the ruling, the pro-death penalty forces vindicated the original reason behind the initiative. Sponsors of the initiative argued that *Furman* did not ban the death penalty when it was mandatory. If restored via the initiative, the death penalty would apply when a prisoner serving a life term killed a prison guard.103 Reagan further argued that the initiative

103 The mandatory death penalty existed in obscure cases such as trainwrecking, i.e. maliciously causing a train to derail, but the killing of a prison guard by a life term prisoner was the only mandatory capital crime proponents thought would occur. Jackson Doyle, “Death Penalty Initiative Staying on Ballot,” *San Francisco Chronicle*, July 8,
allowed the legislature to amend the state’s death penalty law, so the legislature could the law followed *Furman*. Prophetically, given events in the years to come, Reagan said, “[I]t is now more important than ever for Californians to make their views known by voting on the initiative.”

As anticipated, by late July the American Civil Liberties Union filed a taxpayers lawsuit with the state Supreme Court arguing that the death penalty initiative “is a ‘wasteful expenditure of public monies since the United States Supreme Court has already ruled (the death penalty) unconstitutional.’” Attorney General Evelle Younger, a death penalty supporter, responded in two ways. First, the *Furman* decision did not abolish the death penalty in all circumstances. Second, even if the constitutionality of the initiative was in question, the state Supreme Court could not block an initiative. Half a month later, the state Supreme Court issued an unsigned opinion refusing to grant a hearing on the issue; the initiative was to stay on the ballot. As summer waned, the debate’s focus shifted back to the merits of the death penalty.

**Official Arguments on Proposition 17**

The official campaign on the death penalty restoration initiative began when it was officially assigned a number, Proposition 17. With the official start of the campaign, two groups emerged to lead the pro- and anti- Prop. 17 positions. The pro- Prop. 17 group, “‘Friends of the Victim,’” formed in the middle of August 1972. The group built on much of the

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104 Doyle, “Death Penalty Initiative Staying on Ballot.”
105 Draper, “Reaction to the Court’s Ruling.”
109 “Controversial Measures Given Spots on Ballot: Death Penalty Question Now Prop. 17; Marijuana Use, 19; Coast Agency, 20,” *Los Angeles Times* (1923-Current File); *Los Angeles, Calif.*, August 19, 1972, sec. PART II.
organizational apparatus of the California Correctional Officers Association and was named in
order “to turn public sympathy away from the criminal and toward the victims of crime.”

Although the group’s arguments during the campaign focused on deterrence, the idea that
criminals were treated too well foreshadowed the later turn towards the tough-on-crime
framework. Friends of the Victim, led by state Senator H. L. Richardson, sponsored a newspaper
ad and a movie about the death penalty, which both constitute official arguments given the
group’s relation to the prison guard union, which qualified the proposition for the ballot. On the
other side, anti-Prop. 17 forces formed a group aptly titled the Coalition to End the Death
Penalty, which was led by state Senate Majority Leader George Moscone, former governor Pat
Brown, the ACLU, and the American Friends Service Committee, a Quaker organization. The
Coalition to End the Death Penalty also ran a newspaper ad about Proposition 17.

In addition to those two groups, the voter information guide contained official arguments
for and against Prop. 17. It contained: a non-partisan analysis of the law and potential costs from
the Legislative Analyst’s Office, a text and summary prepared by the Attorney General or the
Legislature, and arguments in favor of and against the proposition prepared by proponents and
opponents, respectively. All registered voters received the guide with the sample ballot.

George Deukmejian, the state senator responsible for the push for a constitutional amendment in
the state legislature, wrote the pro- Prop. 17 arguments in the voter information guide along with
S. C. Masterson, a superior court judge, and John Holmdahl, another state Senator. Pat Brown,
the former California governor and honorary chair of Coalition to End the Death Penalty, made

110 “A Group to Fight Death Penalty Ban,” San Francisco Chronicle, August 17, 1972, San Francisco Chronicle
111 “Voter Information Guides | California Secretary of State,” accessed December 18, 2016,
http://www.sos.ca.gov/elections/voting-resources/voter-information-guides/.
1972, http://repository.uchastings.edu/ca_ballot Props/774, 43.
the anti-Prop. 17 arguments in the voter information guide along with Erwin Loretz, the
president of the California Probation, Parole and Correctional Association, and actor and
comedian Bill Cosby.\textsuperscript{113} Cosby’s inclusion on the anti-Prop. 7 side is of particular importance.
Cosby was a well-known celebrity, but he was particularly important to African Americans.
Although there is no concrete evidence, his inclusion could have been an effort to reach out to
African-American voters. By reaching out specifically to African-American voters, thereby
recognizing race, the opponents of Prop. 17 rejected colorblindness and the tough-on-crime
framework. All these official arguments revealed the influence of the law-and-order framework
on the Prop. 17 debate. The pro-Prop. 17 arguments focused almost exclusively on deterrence
and the fear generated by infamous murderers. While the anti-Prop. 17 arguments included more
humanistic views, they mainly focused on countering the deterrence arguments, revealing a
reliance on the law-and-order framing of Prop. 17’s supporters.

\textit{Arguments in the Voter Information Guide}

The pro-Prop. 17 part of the voter information guide argued the death penalty was the
only effective deterrent against crime, which demonstrates the law-and-order framework. After
opening with a brief explanation that the initiative aimed to overturn the \textit{Anderson} decision and
allow the state legislature to amend the reinstated death penalty law, the pro-Prop. 17 argument
employed the written equivalent of shouting to make its position clear. “THE DEATH
PENALTY IS AN EFFECTIVE DETERRENT TO SOME WOULD BE KILLERS.”\textsuperscript{114} The
deterrence-based argument and the influence of the law-and-order framework could not be
clearer. Proponents of Prop. 17 also sought to generate fear. The pro-Prop. 17 argument
mentions Charles Manson and Richard Speck, two infamous mass murderers, as an example of

\textsuperscript{113} “Death Penalty,” 43.
\textsuperscript{114} “Death Penalty,” 42.
why people needed to support the death penalty.\footnote{\textit{Death Penalty}, 42.} Bringing them up served no purpose other than to strike fear into the reader, another key component of the law-and-order framework.

The rebuttal by supporters of Prop. 17 also revealed the influence of the law-and-order framework. It again argued, with statistics, that the death penalty was a deterrent. Supporters of Prop. 17 argued that “[s]topping executions has lead to more killings,” because since 1963, when a de facto execution ban started in California with one exception in 1967, the homicide rate increased 250\%.\footnote{Just to highlight for the reader once more, this is an example of the correlation does not equal causality fallacy. \textit{Death Penalty}, 44.} The rebuttal then argued that the death penalty was the only effective deterrent, a sentence of life without the possibility of parole was not permanent and could be changed by the legislature or commuted by the governor.\footnote{\textit{Death Penalty}, 44.} Supporters of Prop. 17’s persistent use of the deterrence argument demonstrates their reliance on the law-and-order framework.

Two other aspects of the official pro-Prop. 17 voter information guide arguments are worth noting. First, supporters of Prop. 17 countered the humanistic arguments of the initiative’s opponents. For instance, to counter the argument that the death penalty was only applied to racial minorities and the poor, supporters argued that the criminal justice system, “with its overriding concern for the rights of the accused,” ensured everyone had a fair trial.\footnote{\textit{Death Penalty}, 43.} Supporters realized that the people did not necessarily exclusively care about law-and-order-based arguments. The other noteworthy aspect differentiates the law-and-order and tough-on-crime frameworks. While arguing the death penalty was a necessary deterrent, the proponents of Prop. 17 said, “IF THE DEATH PENALTY SAVES THE LIFE OF ONE POLICEMAN OR \textit{ONE PRISON INMATE} OR ONE PRISON GUARD, OR ONE CHILD OR ONE PRIVATE CITIZEN, ITS EXISTENCE IS JUSTIFIED” (capitalization in original, emphasis added). These groups

\begin{footnotes}
\item[\footnote{115}]{\textit{Death Penalty}, 42.}
\item[\footnote{116}]{Just to highlight for the reader once more, this is an example of the correlation does not equal causality fallacy. \textit{Death Penalty}, 44.}
\item[\footnote{117}]{\textit{Death Penalty}, 44.}
\item[\footnote{118}]{\textit{Death Penalty}, 43.}
\end{footnotes}
exemplified innocent people.\footnote{\textit{Death Penalty}, 43.} Tough-on-crime policies aimed to make prison conditions, in addition to the restriction of confinement, punitive. Therefore a person following the tough-on-crime framework would not use precious space in their argument clarifying that an incarcerated person is an innocent person. While it is difficult to prove the lack of something, this inclusion suggested that supporters of Prop. 17 did not rely on the tough-on-crime framework.

While they included some humanistic arguments, opponents of Proposition 17 primarily focused on refuting the idea that capital punishment was a deterrent in the voter information guide. Their argument cited 40 years of studies that showed that “the death penalty does not prevent murders or other violent crimes.”\footnote{\textit{Death Penalty}, 43.} The rebuttal by opponents of Prop. 17 also showed that deterrence was at the top of their agenda. The rebuttal aimed to show that three pro-Prop. 17 assertions were false, and the first false assertion was that the death penalty was a deterrent. Opponents Prop. 17 cited the same studies.\footnote{\textit{Death Penalty}, 43.} Opponents’ overarching focus on deterrence demonstrates the influence of the law-and-order framework.

Other arguments against Prop. 17, however, included humanistic reasoning and even economic claims. The humanistic arguments focused either on the problem of the state as executioner or on the racial and classist disparities death sentences. For example, opponents of Prop. 17 argued, “Human life is not sacred when the state sets an example of violence by executing someone simply because it seems convenient disposal for the problem of crime.”\footnote{\textit{Death Penalty}, 44.} For death penalty abolitionists, capital punishment was a means by which the state cheapens life. The official anti-Prop. 17 argument further noted: the poor and racial minorities were more likely to be executed; it was cheaper to imprison someone for life than to execute the person, and the

\footnote{\textit{Death Penalty}, 43.}
\footnote{\textit{Death Penalty}, 43.}
\footnote{\textit{Death Penalty}, 43.}
\footnote{\textit{Death Penalty}, 44.}
death penalty “aggravates the crime problem by wasting resources needed to fight crime.”

These arguments, which were all utilized by anti-death penalty advocates today, revealed the more humanistic, and even utilitarian, side of the anti-Prop. 17 forces.

Newspaper Ads

In addition to the arguments in the voter information guide, both sides printed newspaper advertisements in the *Los Angeles Times*. Since the ads were paid for by Friends of the Victim and the Coalition to End the Death Penalty, the ads were also official arguments. As with the voter information guide, supporters’ and opponents’ arguments revealed the law-and-order framework. The pro-Prop. 17 ad demonstrated law-and-order fear mongering and deterrence arguments. The anti-Prop. 17 ad relied on the framing of supporters of the proposition and made deterrence the most prominent issue, although the ad also included humanistic arguments.

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123 “Death Penalty,” 43-44. By 1972, there was strong evidence that the death penalty cost more. In his concurring opinion in *Furman*, Justice Thurgood Marshall argued, “[T]here can be no doubt that it costs more to execute a man than to keep him in prison for life.” The increased cost came (and comes) from the added expenses of capital trials and the long, complex post-conviction appeal process. Marshall also pointed to a number of studies related to the cost of the death penalty in a footnote. Marshall, J. (concurring), *Furman v. Georgia*, 408 U.S. 238, 357-358.
Above is the pro- Proposition 17 ad. The title, “ONLY THE INNOCENT SHALL DIE!!!,” demonstrated the fear mongering associated with the law-and-order framework. Combined with the Charles Manson reference in the form of a tombstone for Sharon Tate, an actress who was killed by Manson’s followers, the ad inspired fear that the viewer was the innocent who would die without the death penalty. The bottom of the ad, where H. L. Richardson asked for donations, clarified the possibility of the viewer’s victimization. Richardson wrote, Prop. 17 “will not directly save you money. Instead it will save the lives of innocent victims, possibly your own.” This fear of being a victim of crime is one of the main characteristics of the law-and-order framework. Beyond fear mongering, the pro- Prop. 17 ad focused on deterrence in the text below the picture. The most direct statement accused opponents of Prop. 17 of being “opposed to providing a necessary deterrent to capital crime.” The focus on deterrence is central to the law-and-order framework.

Outside of Sharon Tate, the other names on the headstones reveal an attempt by pro-Prop. 17 forces to reach out to Democrats and African-Americans, who were generally more likely to oppose the death penalty. As part of the outreach to Democrats, the ad included the names of John and Robert Kennedy. Both Kennedy brothers were beloved by Democrats, so their names would have caught Democrats’ attention. Given the near even split of Democrats on capital punishment in the state senate, supporters of Prop. 17 thought they could appeal to traditionally Democratic voters, and, therefore, made an effort to reach out to them. The inclusion of Martin Luther King, Jr.’s name is also important. By including the civil rights icon, pro-Prop. 17 forces

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124 “Display Ad 69 -- No Title,” *Los Angeles Times (1923-Current File): Los Angeles, Calif.*, November 6, 1972, sec. PART III.
125 “Display Ad 69.”
126 “Display Ad 69.”
reached out to African Americans in particular. The specific outreach to African Americans reflects a rejection of colorblindness and, therefore, of the tough-on-crime framework.

Opponents of Prop. 17’s ad took a biting tone. Entitled “Explaining Capital Punishment to Your Children Can Be Murder,” the ad summarized the main arguments against Prop. 17 and concluded that Prop. 7 was a bad measure even for capital punishment supporters.127 In those arguments, opponents of Prop. 17 relied on both the law-and-order framework and a humanistic one. The ad featured a series of possible explanations to give one’s children about why a person supported capital punishment and a series of reasons the explanations would not work. In response to the claim that the death penalty was a deterrent, the ad questioned, “You wouldn't lie to your kids, would you?” It then listed unexpected people who said the death penalty was not a deterrent. “Prison wardens, J. Edgar Hoover, and even the author of Proposition 17, Evelle Younger himself, have admitted that capital punishment doesn't deter the act of murder.”128, the ad aimed to refute the prominent deterrence argument. As seen by the focus on deterrence, the anti-Prop. 17 forces’ newspaper ad also relied on the law-and-order framework.

However, as with other official argument, supporters of Prop. 17 also used humanistic and financial arguments. First, they decried the cost of the death penalty, flippantly calling it “a very expensive habit.”129 This argument about cost was not a response to the pro-Prop. 17 ad about the proposition not being about money because the anti-Prop. 17 ad was published first. Still, this financial argument appealed to people’s pocketbooks if not their consciences.

The ad’s other argument appealed to readers’ consciences. Under the heading “Will They Accept Revenge?” the ad appealed to a fundamental sense of justice: “Kids know all about being

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127 “Display Ad 74 -- No Title,” Los Angeles Times (1923-Current File): Los Angeles, Calif., October 31, 1972, sec. PART ONE.
128 “Display Ad 74.”
129 “Display Ad 74.”
punished for something they didn't do.” Death penalty supporters do not want to execute an innocent person. As made clear by the last lines, the ad intentionally appealed to people who generally supported the death penalty. It concluded by telling readers “The Easy Way Out,” when it came to Prop. 17. “There's an easier way to get around all this, and still be in favor of law and order against murder. Vote no on Proposition 17.” Combined with the reliance on the law-and-order framing of death penalty supporters, the conclusion of the ad demonstrates that the opponents of Prop. 17 wanted death penalty supporters to vote against the proposition.

Pro- Proposition 17 Movie

The final official argument related to Prop. 17 was a movie produced by H. L. Richardson, the state Senator who led Friends of the Victim and a former advertising executive. The California Correctional Officers Association distributed 600 copies of the 17-minute movie around the state, and screening attendees witnessed a mix of “Biblical imprecations and statistics about increasing violence inside prisons.” Part of the movie presented statistics about the deterrence capability of the death penalty. The movie claimed that in the two years preceding the film, during which there was a de facto, nationwide ban on the death penalty, eight prison guards had been killed, which doubled the number for the preceding 27 years. The film concluded that only the death penalty could protect prison guards from

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130 “Display Ad 74.”
131 “Display Ad 74.”
133 Weisser, “Prop. 17 Movie Focuses on Bible.”
134 It is unclear if the death toll of eight prison guards includes the 1971 Attica Prison Uprising. In that uprising alone six prison guards died during a period indiscriminate gunfire from state troopers as the troopers stormed the prison. Taking Attica out of the equation, two prison guards were killed between 1970 and 1972. Two deaths in two years is a higher rate than four deaths in 27 years, but the increase is not nearly as drastic as the film claimed. Heather Ann Thompson, Blood in the Water: The Attica Prison Uprising of 1971 and Its Legacy (New York: Pantheon Books, 2016), 187-188.
incarcerated persons with life sentences.\textsuperscript{135} The focus on deterrence reveals the same law-and-order framework that underlay the pro-Prop. 17 argument since before it qualified for the ballot.

The statistics-based part of the movie was, therefore, unremarkable, but the Biblical part represented a new approach. First the movie depicted Moses receiving the Ten Commandments, most importantly “Thou Shall Not Kill.” The movie also quoted Deuteronomy about the necessity of the death penalty.\textsuperscript{136} The religious arguments were important because one aspect of the tough-on-crime framework that emerged in the years following Proposition 17 was the presence of the Religious Right. The reliance on religious arguments in support of a more punitive criminal justice system thereby foreshadowed the later shift to the tough-on-crime framework. At least one group from the Religious Right supported Prop. 17; the “fundamentalist American Council of Christian Churches of California and the San Fernando Valley Southern Baptist Assn.” came out as the only major religious group in favor of the initiative.\textsuperscript{137}

**Popular Sentiment- Public Figures**

Given the high profile nature of the fight over Proposition 17, a number of eminent public figures without official connections to the pro- or anti-Prop. 17 campaigns shared their views on capital punishment and the constitutional amendment. Far more public figures spoke out against Prop. 17 than spoke in favor of it. The relative lack of comment in favor of Prop. 17 could be explained by the fact that many public figures who supported the death penalty made their views known as part of the effort to qualify the constitutional amendment for the ballot. They may not have felt the need to further state their position. Public supporters’ arguments focused on the


\textsuperscript{136} Weisser, “Prop. 17 Movie Focuses on Bible.”

\textsuperscript{137} John Dart, “REACTION ON ETHICAL ISSUES MILD: 6 Propositions Fail to Stir Religious Fervor 6 Propositions Fail to Stir Religious Fervor,” *Los Angeles Times (1923-Current File); Los Angeles, Calif.*, October 27, 1972, sec. Orange County.

The only two public figures to announce their support of Prop. 17 during the campaign period were Governor Reagan and state Attorney General Younger. Reagan declared his support for Prop. 17 as part of an announcement of his positions on all the propositions. As governor, he was expected to make his views known on the propositions, but the summer had not changed his argument at all. As he had during the spring, Reagan supported Prop. 17 because of he believed that the death penalty was a deterrent.\(^{138}\) Reagan’s continued focus on deterrence revealed his continued reliance on the law-and-order framework. Younger’s support for Prop. 17 makes the influence of such a framework even clearer because of the occasion of his announcement. Younger made a speech supporting Prop. 17 before a group called “Citizens for Law and Order.”\(^{139}\)

The influence of the law-and-order framework on the public figures in opposition to Prop. 17 was less clear. While some public figures made humanistic arguments, others attempted to refute the deterrence arguments of supporters revealing their reliance on the law-and-order framework. One of the first non-politicians to announce opposition to Prop. 17 was Cesar Chavez, the farm labor activist. Chavez claimed that Prop. 17 was more important than a proposition that would ban farmer laborers from striking during harvest season and would prevent secondary boycotts (Prop. 22).\(^{140}\) Chavez’s statement was surprising given that Prop. 22 was a direct attack on his effort to organize farmworkers and win labor campaigns. However, as


\(^{139}\) Philip Hager, “Younger Raps Court’s Death Penalty Upset,” \textit{Los Angeles Times (1923-Current File)}; \textit{Los Angeles, Calif.}, October 4, 1972, sec. PART II.

Chavez explained, fighting the death penalty was that important because “‘[t]he only people who get executed are poor people and we come from that class of people.’” Such an argument reflects one of the humanistic positions taken by opponents of Prop. 17. Clinton Duffy, a former warden at San Quentin—the California prison that housed death row—announced his opposition to Prop. 17 based on humanistic, financial, and law-and-order arguments. Duffy argued that capital punishment targeted the poor and was more expensive than life imprisonment, but those arguments were secondary to his argument about deterrence. Duffy argued that the death penalty, in his experience as warden and as a member of the Governor’s Advisory Pardon Board, was not a deterrent.  

Finally, Anthony Amsterdam, the anti-capital punishment attorney, announced his opposition to Prop. 17 at a press conference with two Stanford University psychiatrists. At the press conference, the trio made a bizarre yet interesting argument about how capital punishment was the opposite of a deterrent. They argued that the death penalty generated more murders than it deterred because suicidal people who were too afraid to kill themselves will commit murder so that the state would kill them instead.  

The intense focus on deterrence from Amsterdam and his colleagues revealed their reliance on the law-and-order framing of supporters of Prop. 17.

**Popular Sentiment- Newspapers**

Newspapers provide the best insight into popular sentiment on Proposition 17, and they reveal that popular arguments around capital punishment were similar to the sentiments of the official campaigns and public figures. The editorial boards of both the *Los Angeles Times* and

142 “Professors’ View Of Death Penalty,” *San Francisco Chronicle*, October 12, 1972, San Francisco Chronicle Microfilm Reel Oct. 10-Oct. 20, 1972, Library of Congress: Newspaper and Current Periodical Reading Room. Although the argument appears bizarre, the national NAACP started tracking suicide by death penalty in the late 1970s after Gregg lifted the moratorium on capital punishment. By 1984, the group recorded four suicides by death penalty. It is important to note, however, that the NAACP looked at giving up remaining appeals as suicide rather than committing a crime in the first place. “Execution Alert” (National Execution Alert Network, October 19, 1984), Part VIII: 147, Folder 2, Library of Congress: Manuscript Division, NAACP Archive.
Los Angeles Sentinel wrote articles in opposition to Prop. 17. While the Sentinel opposed Prop. 17 for humanistic reasons, the Times demonstrated the dual reliance on humanistic and law-and-order arguments common among opponents of Prop. 17. The Los Angeles Times also ran a pair of opinion articles, one in support of capital punishment—by H.L. Richardson—and the other opposed to it—by a leading penologist. The pro-death penalty article relied exclusively on the law-and-order framework, but the anti-death penalty article included a mix of humanistic and law-and-order arguments. Finally, there were a number of letters to the editor on both sides of Prop. 17. The letters supporting Prop. 17, unsurprisingly, relied on deterrence-based arguments. However, the letters opposing Prop. 17 relied almost exclusively on humanistic arguments, a departure from the mixed arguments of the official campaign and public figures.

Editorials

The Los Angeles Times editorial board opposed Prop. 17 for humanistic and law-and-order reasons. The influence of law and order was clear from the start. The editorial board explained, “An important measure of any society is the means it employs to maintain order through law.”\(^\text{143}\) The editorial board adopted the language of law and order, even as it was discussing a broader, philosophically-based, societal goal of preventing harmful acts. The influence of the law-and-order framework again was clear when the editorial board argued that the death penalty was not a deterrent. However, the board also made humanistic arguments at the end of the article. In fact, the board was almost unique in its decision to focus on the possibility of executing an innocent person. The board asserted that making capital punishment mandatory,

\(^{143}\) “NO on the Death Penalty,” Los Angeles Times (1923-Current File); Los Angeles, Calif., October 20, 1972, sec. PART II.
the only type that would be allowed under the U.S. Supreme Court’s *Furman* ruling, would only increase the possibility of committing an irreversible error.\(^{144}\)

While the *Los Angeles Times* editorial board only made humanistic arguments at the end of its article, the *Los Angeles Sentinel*’s recommendations exclusively included those arguments. First, a note on the source of the recommendations; the *Sentinel*’s recommendations were not made by an editorial board but rather by a “non-partisan committee of community leaders” who sought “to better the lifestyle of the Greater Los Angeles Black Community” based on their “proven record of achievement” in electoral and civil rights campaigns.\(^{145}\) That group made recommendations based exclusively on how “they affect the Black community.”\(^{146}\) First, the *Sentinel*’s committee argued that African-Americans and the poor, and most often poor African-Americans, “are the victims of the death penalty.”\(^{147}\) The committee’s focus on the disparate impact of the death penalty represented one humanistic argument. The committee also argued the death penalty was not the way to handle “violence and protection for peace officers and prison employees.”\(^{148}\) This argument was similar to the opening line of the *Los Angeles Times* editorial, but importantly it did not rely on law-and-order language, thereby rejecting supporters frame.

*Opinion Articles*

In addition to its editorial on Prop. 17, the *Los Angeles Times* ran a pair of opinion articles in support of and against the death penalty in general. The article in support of the death penalty was written by H. L. Richardson, the leader of Friends of the Victim and the official pro-Prop. 17 campaign. As a result, the pro-death penalty opinion piece unsurprisingly relied on the law-and-order framework. The article opened with the story of a prison guard who was stabbed

\(^{144}\) “NO on the Death Penalty.”
\(^{146}\) “Display Ad 48.”
\(^{147}\) “Display Ad 48.”
\(^{148}\) “Display Ad 48.”
three times near his heart by an inmate serving a sentence of life without the possibility of parole. Based on the story, Richardson argued that without the death penalty, there was nothing to deter more inmates from behaving in such a way. The focus on the deterrent benefits of capital punishment is a key aspect of the law-and-order framework. The article also fear mongered. Richardson explained that the “carnage of the innocents [is] mounting.” Although the statement was not as explicit as some arguments, it implied that the reader could be the next to fall victim to the “carnage.” In addition to those law-and-order arguments, Richardson’s opinion reiterated the Biblical arguments from the movie. The reliance on Biblical arguments represented another attempt to reach out to the Religious Right.

Richard McGee, the author of the anti-capital punishment article, was not involved with the official anti- Prop. 17 campaign. McGee was a leading penologist. His article mixed humanistic and law-and-order arguments similar to the official arguments against Prop. 17. McGee’s article, in contrast to most anti-Prop. 17 articles, began with humanistic arguments. After a long discussion of how his opinion formed over 30 years as the Director of Corrections in California, McGee argued that the system unevenly punished and over punished the murderer rather than focusing on rehabilitation. McGee’s belief in the importance of rehabilitation represents a humanistic argument. However, the rest of the article revealed McGee’s additional reliance on the law-and-order framework. Specifically he argued that the death penalty is not a deterrent and does not protect prison guards. His deterrence argument focused on a comparison

149 H. L. Richardson, “Is the Death Penalty Appropriate in a Modern Society?...PRO...,” Los Angeles Times (1923-Current File); Los Angeles, Calif., October 31, 1972, sec. PART II.
150 Richardson, “Is the Death Penalty Appropriate in a Modern Society?”
151 Richardson, “Is the Death Penalty Appropriate in a Modern Society?”
152 RICHARD A. McGEE, “...con...,” Los Angeles Times (1923-Current File); Los Angeles, Calif., October 31, 1972, sec. PART II.
between the crime rates in Michigan and Illinois, two similar states except for the issue of capital
punishment.\footnote{McGEE, “...con...”} His focus on deterrence revealed the influence of the law-and-order framework.

\textit{Letters to the Editor}

Letters to the editor represent the final expression of popular sentiment in newspapers. They revealed that the arguments of ordinary citizens were similar to the arguments of the official campaigns. The letters to the editor in support of Prop. 17 relied on the law-and-order framework, and one rejected the tough-on-crime framework. One letter discussed the primary importance of keeping people safe stating, “Almost the only angles I hear discussed are those of punishment and deterrence.”\footnote{John M. Ashley, “Proposition 17: Capital Punishment,” \textit{Los Angeles Times (1923-Current File)}; \textit{Los Angeles, Calif.}, November 4, 1972, sec. Part II.} While the letter is short and unclear, the importance of deterrence was obvious. Another letter rejected the statistics that undermine the deterrence argument and claimed that even if such statistics were true, it did not make sense to end the practice of capital punishment merely because it did not deter all murderers. The letter’s focus on deterrence revealed the influence of a law and order framework. The second author’s view on prison conditions was also important. In arguing that the death penalty is not “cruel and unusual” punishment, the author stated that “cag[ing] a human for life” is the real cruel and unusual punishment.\footnote{C. E. PRUSSO, “LETTERS TO THE TIMES: Proposition 17: The Death Penalty,” \textit{Los Angeles Times (1923-Current File)}; \textit{Los Angeles, Calif.}, October 28, 1972, sec. PART II.} The writer’s concern about prison conditions is antithetical to the tough-on-crime framework because tough-on-crime policies increased the punitiveness of prison conditions.

The letters to the editor in opposition to Prop. 17 primarily included humanistic arguments. One letter argued that no one, especially not the state, had the right to murder someone. “In the name of justice it seems we have just as much right to kill someone else as he
[the murderer] has!“ The letter further argued for an increased focus on rehabilitation. Both of those arguments represent a humanistic perspective. Another anti-Prop. 17 letter to the editor included both humanistic and deterrence arguments. The letter started by citing a famous book on the fall of the Roman Empire: “When a society sinks to revenge as a method of curing social ills that society will consume itself in an orgy of lust-motivated violence.” The idea that capital punishment is nothing more than retributive justice and the moral indefensibility of that position both represent humanistic arguments. However, the author of the letter then cited the Stanford University study on how the death penalty actually invited crime from people who are suicidal. The desire to reject a deterrence-based argument reflected the influence of the law-and-order framework. The anti-Prop. 17 general public mainly relied on humanistic arguments but was not immune from the law-and-order framing of the supporters of Prop. 17.

**Popular Sentiment- Polls and Results**

Despite vigorous arguments by both the official campaigns and various outside sources, polling on Proposition 17 showed lopsided support for the measure. In early September, a poll on capital punishment found 66% of Californians in favor of the death penalty and 24% opposed. Support for the death penalty was the highest recorded since polling began 15 years earlier, in 1957. Asked about Prop. 17 specifically, the public supported the constitutional amendment by a two to one majority. A poll conducted in October found that only 20% of Californians knew about Prop. 17. Out of context this appears surprising, but the article noted typically few

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158 This is the same study on which Anthony Amsterdam relied in his press conference. Riley, “LETTERS TO THE TIMES.”


160 Field, “HIGHEST IN 16 YEARS OF TESTING.”
people aware of the proposition, even by October.\textsuperscript{161} Regardless, support for Prop. 17 was between 60% and 70% for both those people who knew about the proposition and those people who were told on the spot about the contents of the proposition.\textsuperscript{162} The final general poll was conducted a week before the election. It found that almost 60% of people favored Prop. 17 with 29% opposed and 14% undecided. As the poll analysis noted, even if all undecided voters voted against Prop. 17, it would still win if no major shifts in decided voters occurred.\textsuperscript{163}

Given the lack of uncertainty surrounding Prop. 17, it is not surprising that no major poll investigated the reasons people supported or opposed the constitutional amendment. One poll gave very indirect insight into voters’ thinking on Prop. 17. The \textit{Los Angeles Times} reported on a poll of middle and high school students in Fullerton, a heavily white and Republican area of the state. The poll, according to the reporter, can give insight into the minds of voters because the middle school students supported the same positions as their parents for the same reasons.\textsuperscript{164} Some of the middle school students, nearly all of whom supported Prop. 17, argued that the death penalty was a necessary deterrent, which reflected the law-and-order framework of their parents.\textsuperscript{165} The results of this poll clearly must be taken with heavy skepticism and they are not generalizable outside Fullerton. However, the poll still showed that among the general public, some people were influenced by deterrence arguments based on the law-and-order framework.

Given the lopsided polls, the results were predictable. When all the results were tallied, Californians supported the constitutional amendment on death penalty restoration in the state by

\textsuperscript{161} “Most Voters Undecided on Prop. 19, Poll Finds: 74% Found to Be Unaware of Marijuana Measure or Say They Lack Information FOES OF PROP. 21,” \textit{Los Angeles Times (1923-Current File)}; Los Angeles, Calif., October 25, 1972, sec. PART ONE.
\textsuperscript{162} “Most Voters Undecided on Prop. 19, Poll Finds.”
\textsuperscript{163} Mervin D. Field, “Death Penalty Initiative Favored 2 to 1 in Poll: 51% Say ‘No’ to Marijuana Proposition; Indecisiveness Marks Other Questions,” \textit{Los Angeles Times (1923-Current File)}; Los Angeles, Calif., November 3, 1972, sec. PART ONE.
\textsuperscript{165} Boettner, “Two Fullerton Schools Give Nixon Edge.”
a two to one margin.\textsuperscript{166} There was no in-depth study of the results. There are a couple of possible reasons for the lack of analysis. First, given the debate over whether Prop. 17 would actually be able to reinstate the death penalty in light of the U.S. Supreme Court ruling, it may not have been worth the cost to analyze a possibly moot initiative. Second, given that immediately following the constitutional amendment, there was a push to pass a law on the issue, news organizations may have focused on the impact of the results rather than the reasons behind the results.

Conclusion

For all the bluster surrounding the restoration of the death penalty and the campaign on Proposition 17, the result of the election was a foregone conclusion. However, the landslide victory of Prop. 17 does not eliminate the importance of the arguments surrounding the proposition. By focusing the bulk of their arguments on the death penalty as a deterrent, Prop. 17’s supporters heavily relied on the law-and-order framework. While the level of concern about prison conditions made clear that Prop. 17’s proponents had not in large numbers switched to the tough-on-crime framework, other pro-Prop. 17 voices, who argued prison conditions were not harsh enough, were harbingers of the coming shift. Opponents of Prop. 17 made a number of humanistic arguments that focused on the discriminatory impact of the death penalty and the basic issues of morality when the state served as executioner. Despite those humanistic tendencies, from the beginning anti-capital punishment voices could not resist the law-and-order framing and often argued that the death penalty was not a deterrent. While the supporters of Proposition 17 won the election, the fight was far from over both in California and nationally.

\textsuperscript{166} Robert Rawitch, “Death Penalty OK’d but Its Use Could Be Years in Future: DEATH PENALTY,” \textit{Los Angeles Times (1923-Current File); Los Angeles, Calif.}, November 9, 1972, sec. PART ONE.
In light of the U.S. Supreme Court’s ruling in *Furman*, supporters and opponents of capital punishment agreed that only a mandatory death penalty law would be constitutional.\(^{167}\) While the ACLU and Anthony Amsterdam believed the U.S. Supreme Court would abolish capital punishment outright if given a mandatory death penalty case, supporters of the death penalty were optimistic and wanted to focus on legislation to increase the number of mandatory capital crimes.\(^{168}\) Despite a unified goal, confusion reigned among capital punishment supporters immediately following Prop. 17’s passage. Attorney General Younger argued that there were already four mandatory death penalty crimes based on the law that pre-dated *Anderson*, but H. L. Richardson claimed that *Anderson* had wiped the legislative book clean, regardless of Prop. 17’s stipulation to the contrary.\(^{169}\) At the same time, anti-capital punishment forces in the legislature, led by state Senate Majority Leader George Moscone and Assembly Speaker Robert Moretti, prepared to oppose any legislative efforts to add to the list of capital crimes.\(^{170}\) The fight over mandatory capital crimes would come to a crescendo in the next year, 1973.

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\(^{167}\) Rawitch, “Death Penalty OK’d but Its Use Could Be Years in Future.”


\(^{170}\) Burks, “Many Questions.”

As promised, by the middle of March 1973, California state Senator George Deukmejian, a Republican from Long Beach, had introduced a bill to make certain crimes carry a mandatory death sentence, provided that an additional special circumstance existed. The bill, Senate Bill 450, threatened to revive the debate over capital punishment that had consumed California (and the nation) for the entire previous year. Anti-death penalty forces led by high-ranking Democrats in the state legislature were ready to continue to argue capital punishment on its merits. However, pro-death penalty forces, led by Republicans and public safety unions, believed they had already won this debate given the results of the initiative the previous year, in which two-thirds of Californians voted to restore capital punishment. The unsettled nature of the debate was only furthered by the lack of clarity from the U.S. Supreme Court. Furman v. Georgia was the law of the land, but the contents of that law were not clear. As a result of this uncertainty, the debate over capital punishment in California and the U.S. continued.

This chapter serves as a bridge within the thesis. First, the chapter covers the period of time between the two initiatives, Propositions 17 and 7. In that time, California’s death penalty law changed twice through SB 450 in 1973 and SB 155 in 1977. The chapter examines the ways in which SB 450 was the result of the 1972 initiative and in which the debate over SB 155 served as the roots of the 1978 initiative. The chapter also serves as a bridge between the old death penalty system and the modern one. The Supreme Court provided clarity on capital punishment in its 1976 ruling, Gregg v. Georgia. This chapter examines that ruling and its impact on the

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171 This chapter will provide a more detailed explanation of the bill shortly. For now it is important to know that first-degree murder was the main crime that carried a mandatory death penalty. In order to receive a mandatory death sentence for first-degree murder, the jury also had to find at least one special circumstance, such as the first-degree murder happened during the commission of a violent felony. “Chapter 719,” California Statutes (1973); “Measure to Reinstate Death Penalty Offered: Deukmejian Proposal Would Be Mandatory for Certain Crimes,” Los Angeles Times (1923-Current File); Los Angeles, Calif., March 15, 1973, sec. Part I.
design of capital punishment schemes. Finally, this chapter serves as a bridge between the two key frameworks in this thesis, the law-and-order framework and the tough-on-crime framework. The debate on SB 450 in 1973 demonstrates the continued strength of the law-and-order framework, but the debate on SB 155 in 1977 exhibits the rise of the tough-on-crime framework.

**The 1973 Death Penalty Law**

Despite the uncertainty surrounding capital punishment in California in 1973, supporters of capital punishment took control of the debate. They set the debate on grounds other than the death penalty because of an influential anti-capital punishment legislator’s comment. When SB 450 passed the state Senate, state Assembly Speaker Bob Moretti, a Democrat from Van Nuys, said the bill to restore the death penalty had “little chance” to pass in the Assembly given that a majority of the members on the Assembly Criminal Justice Committee, which would handle the bill, opposed the death penalty. With those two words, the debate on SB 450 no longer mainly focused on the merits of the death penalty but rather on respecting the will of the people. While some groups argued about deterrence, which revealed the law-and-order framework, the main arguments for SB 450 focused on the government needing to represent the will of the majority.

**The Specifics of the Bill**

Before delving into arguments in support of and against SB 450, it is important to understand the bill itself. The United States Supreme Court’s decision in *Furman v. Georgia* (1972) was widely understood to allow the death penalty only if the sentence was mandatory. SB 450 stipulated that there would be a two-part trial. The first part would determine if a defendant was guilty of a capital crime, and the second part would determine if an additional

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173 Making the death penalty mandatory was meant to ensure capital punishment was not applied arbitrarily, which was the problem addressed in *Furman*. 
special circumstance existed, which was necessary for a death sentence.\textsuperscript{174} The most frequently charged capital crime was first-degree murder, but others included: kidnapping resulting in death, train wrecking, and a deadly assault by an inmate serving a life sentence in which the victim dies within one year and one day.\textsuperscript{175} The special circumstances were meant to ensure that the death penalty was only applied in the most heinous first-degree murder cases, the cases in which the ultimate penalty was truly warranted.\textsuperscript{176} These special circumstances were: murder for hire, killing a peace officer in the line of duty, killing a witness to prevent the witness’s testimony, and murder committed during the commission of certain violent felonies.\textsuperscript{177} If a defendant was found guilty of first-degree murder and a jury found at least one of the special circumstances true, the defendant was automatically sentenced to death.

Because SB 450 lacked a section regarding intent, it is difficult to understand the reasoning behind specific features of the bill. However, the amendments and the inclusion of certain elements reveal the influence of both the law-and-order framework and the tough-on-crime one. First, SB 450 gave prosecutors seeking the death penalty two attempts to have a jury find one of the special circumstances was true. If the first jury could not decide that at least one special circumstance was true and did not decide that all special circumstances were false, i.e. there was at least one deadlock on a special circumstance, then a second jury could make a

\textsuperscript{174} Chapter 719, 1298.
\textsuperscript{175} Train wrecking was the legal term for causing a train to derail with criminal intent. Only a capital first-degree murder conviction required the finding of a special circumstance before the imposition of a death penalty. The other three crimes did not require a separate finding of a special circumstance because they were more specific and involve crimes heinous enough to warrant capital punishment without additional factors. Chapter 719, 1300-1301.
\textsuperscript{176} It is generally accepted by death penalty experts in the legal field that the death penalty is only for the truly worst of the worst crimes. José B. Ashford and Melissa Kupferberg, \textit{Death Penalty Mitigation: A Handbook for Mitigation Specialists, Investigators, Social Scientists, and Lawyers} (New York: Oxford University Press, 2013), 6. However, certain special circumstances could be justified on other grounds. For example, people in favor of Prop. 17 argued that the deadly assault on a prison guard special circumstance acted as a deterrent because no other penalty could apply to them.
\textsuperscript{177} Those violent felonies were: robbery, kidnapping, rape, child molestation, and burglary. Chapter 719, 1299-1300.
finding on the deadlocked special circumstance(s).\textsuperscript{178} In practice, the ability to call a second jury increased the possibility that a death sentence would be imposed, which can be viewed through either the law-and-order framework or the tough-on-crime one. From the law-and-order point of view, a second opportunity for a death sentence increased the deterrent impact of the death penalty. From the tough-on-crime perspective, a second opportunity increased the possibility of a harsher penalty. The tough-on-crime framework was also evident because of something excluded from the bill. In SB 450, a deadly assault by an inmate serving a life term was a capital crime, but there was an exception. A deadly assault on another inmate was not a capital crime.\textsuperscript{179} The tough-on-crime framework includes a lack of concern about prison conditions, and not including deadly assaults on other inmates showed that lack of concern. Supporters of capital punishment thought the death penalty protected potential victims. By not including other inmates, proponents were not extending the death penalty’s protection to them. State Senator Deukmejian, the bill’s author, told reporters he initially made deadly assaults on other inmates a capital offense, but removed that clause to appeal to pro-death penalty Democrats in the Assembly.\textsuperscript{180} Regardless of the legislative reason for the change, it revealed the tough-on-crime framework.

The law-and-order and tough-on-crime frameworks did not influence the entirety of SB 450; it included more humanistic elements as well. First, the bill banned the death penalty for juveniles, which was not banned nationally until 2005.\textsuperscript{181} Second, the bill included numerous protections against guilty pleas. A defendant would not be allowed to enter a guilty plea in a capital case without a hearing on special circumstances—essentially a defendant would not be allowed to plead guilty when such a plea would lead to a mandatory death sentence. The bill also

\textsuperscript{178} Chapter 719, 1299.
\textsuperscript{179} Chapter 719, 1300.
\textsuperscript{180} “Author Will Soften Death Penalty Bill to Improve Chances: DEATH PENALTY,” \textit{Los Angeles Times} (1923-Current File); Los Angeles, Calif., August 30, 1973, sec. PART ONE.
included additional protections against making a guilty plea without a lawyer’s advice in non-capital cases.\textsuperscript{182} While these elements were humanistic, California had not had the death penalty for juveniles in earlier laws, and it is possible that opponents of capital punishment, rather than supporters, inserted the guilty plea protections.\textsuperscript{183} Thus, the humanistic elements do not overshadow the influence of the law-and-order and tough-on-crime frameworks.

\textit{The Main Argument: The Will of the People}

While the bill’s text showed the influence of the law-and-order and tough-on-crime frameworks, the principal argument over SB 450 was not whether the state should have a death penalty law. Instead, supporters of SB 450 argued that the people had already spoken via Prop. 17 and the legislature needed to respect and follow the desires of the people. Underlying the claim that the legislature should follow the will of the people, however, were the same law-and-order arguments that stemmed from a belief in deterrence and from the fear of murderers.

Republicans were the main supporters of the death penalty and started making the will of the people argument even before Deukmejian introduced SB 450. When speaking at a fundraising dinner for a Republican candidate for state Senate, Governor Ronald Reagan, for example, emphasized that conservatives’ belief in small government meant they would allow the people to govern themselves. Reagan said choosing a Republican meant choosing “‘someone who will uphold the people’s right to govern themselves.’”\textsuperscript{184} Allowing people to govern themselves necessarily meant following the results of a initiative such as Proposition 17. At the

\textsuperscript{182} Chapter 719, 1301.
\textsuperscript{183} Neither the Senate nor Assembly Daily Journal indicated when these protections were added to the bill. They also did not include the original text of the bill. As a result, it was unclear whether supporters or opponents of the death penalty added guilty plea protections to the bill.
\textsuperscript{184} Without Reagan’s additional definition of small government in this quote, the idea of small government and support for capital punishment would appear contradictory; the existence of capital punishment increased the size of the government because the government must provide separate death row facilities, the execution chamber, etc. Kenneth Reich. “Reagan, GOP Hopeful Back Death Penalty,” \textit{Los Angeles Times} (1923-Current File); Los Angeles, Calif., February 7, 1973, sec. PART II.
same dinner, Reagan also emphasized Republican support for the death penalty, so the relation between the capital punishment bill and the will of the people argument was ready made.

The will of the people argument did not surface again until after the state Senate passed SB 450 in early May. With Deukmejian as a member of the Senate Judiciary Committee, which handled the bill in the upper house, SB450 quickly moved through committee and passed the Senate 27-12 with nearly the entire Republican caucus (17 of 19) and half of the twenty-member Democratic caucus (mostly those who were not in leadership) voting for the bill. At the time, Deukmejian said SB 450 restored the death penalty because it was a deterrent, a reference to the law-and-order framework, and because Prop. 17 showed the people wanted it. However, the same day the bill passed the Senate, Assembly Speaker Moretti said the bill had “little chance” in the Assembly Criminal Justice committee. Moretti’s statement caused a surge of populist outrage, on which Republicans who were leading the death penalty push would capitalize.

On May 4, the day following Moretti’s remark, the Los Angeles Times ran four letters to the editor opposing the statement. One author accused “[t]his self-adulatory group of dictatorial politicians” of saying “they, better than the citizenry, know what is best for us.” Another letter reminded Moretti “that he is part of a legislative process that professes government of the people, by the people, for the people,” which could be accomplished by removing him from office. Both letters implied Moretti was going against the will of the people and even the democratic nature of the system itself by opposing SB 450. The argument of the letters in relation to the bill was clear: passing SB 450 was the democratic thing to do since it was what the people wanted.

185 Gillam, “State Senate OKs Death Penalty Bill.”
186 Gillam, “State Senate OKs Death Penalty Bill.”
187 Gillam, “State Senate OKs Death Penalty Bill.”
189 Stan Ehrlrich, “Letters to The Times: Moretti’s Statement on Death Penalty Bill,” Los Angeles Times (1923-Current File); Los Angeles, Calif., May 4, 1973, sec. PART II.
The same letters also revealed the influence of law-and-order ideas. The second letter bemoaned that the Warren Court was responsible for the “breakdown of law and order.” Only by following the will of the people could law and order be restored. The public argument was similar to Deukmejian’s, but with reversed priorities. While Deukmejian argued based on law-and-order and then the will of the people, the letters put the will of the people first.

As more members of the public expressed similar opinions through letters to the editor, Moretti quickly retreated from the absolutist nature of his earlier comments. Before the committee had taken up the bill, he said there was “some possibility” the bill would pass committee given the people’s vote on Prop. 17. Then, in response to an opening on the Assembly Criminal Justice Committee, which was responsible for SB 450, Moretti appointed Assemblyman Julian Dixon, an African-American Democrat from Los Angeles in his first term. Dixon’s appointment was important for multiple reasons. In relation to the populist uproar about Moretti’s comments, Dixon said he was open-minded on the death penalty, especially because of Prop. 17’s outcome. While Dixon had previously said he was against the death penalty, Moretti’s willingness to appoint someone who at that point professed to be open-minded about it demonstrated he wanted to appear to allow the people’s view into the process. This appearance was bolstered by the fact that Dixon was the swing vote on the committee and upon appointment said, “I am setting aside all prior thoughts [on the death penalty]… and I will listen to testimony on both sides.” As a result, Dixon appeared willing to vote in favor of SB 450 and respect the

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190 Ehlrich, “Letters to The Times: Moretti’s Statement on Death Penalty Bill.”
192 Gillam, “Moretti Puts Critic of Death Penalty on Panel Weighing It.”
193 Gillam, “Moretti Puts Critic of Death Penalty on Panel Weighing It.”
will of the people in response to populist anger. Second, by appointing Dixon, Moretti was surely reaching out to the African-American community, a key anti-death penalty constituency. As will be discussed later in the chapter, Moretti tried to engage more anti-capital punishment voices in the fight against SB 450, which would provide some political cover by showing that not all the people wanted the death penalty. African Americans were uniquely situated to do this because they were probably the only group to have a majority or plurality vote against Prop. 17.\footnote{There were no exit polls in 1972 to show a breakdown of voting based on race, but a 1977 poll (after a more pro-death penalty swing overall) showed African Americans as the only racial group to have a plurality opposed to the death penalty. Mervin D. Field, “ONLY 23% OPPOSE IT: Death Penalty Favored by 71%, Survey Finds,” Los Angeles Times (1923-Current File); Los Angeles, Calif., July 20, 1977, sec. Orange County.}

Despite Moretti’s efforts, a lack of actual progress through the Assembly Criminal Justice Committee meant that populist arguments in favor of the death penalty continued to dominate.\footnote{The Criminal Justice committee held a hearing on SB 450 and other death penalty bills in late June, just before the start of a five-week summer recess, but outside of that, took no action until August. “California Legislature 1973-74 Regular Session Assembly Daily Journal” (State of California, 1974 1973), 3589, 6744.} Deukmejian started employing them: “With continued public support, I am hopeful that the bill will be allowed to reach the full Assembly for a vote to carry out the will of the people.”\footnote{GEORGE DEUKMEJIAN, “Death Penalty,” Los Angeles Times (1923-Current File); Los Angeles, Calif., June 28, 1973, sec. PART II.} Deukmejian’s letter notably did not reference deterrence or other pro-capital punishment arguments. The letter’s argument in favor of SB 450 focused entirely on the will of the people. The influence of will of the people arguments grew rapidly. During the early months of 1973, anti-capital punishment forces mainly focused on both a lack of deterrence and humanistic reasons to oppose the death penalty (as will be discussed later in the chapter). However, during the summer months that were key to the passage of SB 450, ordinary people who opposed the death penalty (legislators were largely silent) started arguing on the grounds of the will of the people. For example, one letter to the editor praised Moretti for being “courageous” and asked pro-capital punishment people, “Would they still be so upset if Moretti was blocking legislation
against the anti-death penalty people?"\textsuperscript{197} The will of the people argument was strong is clear because anti-death penalty and anti-SB 450 voices felt the need to counter it.

Ultimately, the will-of-the-people argument gained traction, and the Assembly Criminal Justice Committee acted on SB 450. The Committee replaced capital punishment with a life sentence without the possibility of parole, and passed it on a party-line vote of four Democrats in favor to three Republicans opposed. While the Committee appeared to defeat the move to reinstate capital punishment, everyone on it and in the state legislature knew Deukmejian had enough votes to amend SB 450 on the floor and pass a bill that included capital punishment if it was passed out of committee.\textsuperscript{198} The Democrats on the Assembly Criminal Justice Committee knew that passing SB 450 out of committee meant death penalty bill would pass the Assembly and be signed into law by Reagan. By amending the bill and passing it, the Democrats bent to the pressure of the populist arguments. None of the Democrats changed their convictions—they were all still against the death penalty—so they acted based on a different argument. The only other argument was that the legislature should follow the will of the people.

Two weeks after the Assembly Criminal Justice Committee passed the amended bill, Republican Assembly leader Bob Beverly used a floor amendment to reinsert capital punishment into it. The bill passed 52 to 15, with all Republicans and many pro-death penalty Democrats supporting the bill.\textsuperscript{199} Supporters arguments urging final passage demonstrated the influence of the will of the people argument and the way it supplemented law-and-order arguments. On the floor, Beverly proposed an amendment to restore capital punishment to SB 450 saying, “‘I ask an

\textsuperscript{198} Jerry Gillam, “Death Penalty Virtualy Certain to Be Restored: Assembly Committee Approves Measure but It Is Expected to Be Revised on Floor PRISON,” \textit{Los Angeles Times (1923-Current File)}; Los Angeles, Calif., August 24, 1973, sec. PART ONE.
aye vote for the safety and protection of society.” The focus on protecting society demonstrated a belief in deterrence and the law-and-order framework. However, after the bill was passed, California Attorney General Evelle Younger, another pro-death penalty Republican, announced, “[T]he Assembly has shown it is responsive to the will of the people who have said they want capital punishment…by a 2-1 margin.” The law-and-order framework was the impetus for introducing SB 450, but the populist will of the people argument led to the bill’s passage. Following the will of the people, Reagan signed the bill into law in late September.

**Opposition Arguments: Deterrence and Humanistic Reasoning**

While opponents of capital punishment ultimately gave into the pressure of populist logic, arguments they made before and after the passage of SB 450 demonstrated the continued influence of both the law-and-order framework and humanistic views on their arguments.

Before SB 450 passed, a range of anti-death penalty arguments came from editorials, letters to the editor, and statements from opponents of capital punishment in the state legislature. A *Los Angeles Times* editorial demonstrated a number of law-and-order arguments. The editorial board argued the death penalty was not a deterrent and then argued, “Life terms provide an adequate means to remove from society those who threaten it.” The focus on deterrence and preventing threats society are classic parts of the law-and-order framework. Legislators also revealed the framework’s influence. In announcing his opposition to Deukmejian’s bill, Assemblyman Dixon said, “‘I feel a study of the death penalty will clearly demonstrate that it is

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200 Gillam, “Death Penalty Bill Passes Assembly.”
201 Gillam, “Death Penalty Bill Passes Assembly.”
not a deterrent.”\textsuperscript{204} The focus on deterrence again shows that opponents felt the need to respond to the law-and-order framework of supporters. The general public, in their opposition to the death penalty, however, made humanistic arguments in addition to deterrence-based one. One letter to the editor complained, “We are always looking for the easy way out. Fry those who commit crimes, but don't do anything to find out the cause.”\textsuperscript{205} The concern about the root causes of crime, which the author implied were societal problems, demonstrates humanistic opposition to capital punishment. However, the general public also was influenced by law-and-order arguments. One letter cited two studies that showed the death penalty was not a deterrent.\textsuperscript{206}

After making will of the people arguments during the heart of the Assembly debate on SB 450, opponents of capital punishment returned to law-and-order and humanistic arguments to criticize the revival of the death penalty in California. An opinion piece from two staff members with the American Civil Liberties Union—which was not active in newspapers before the bill was passed but presumably was active in other ways given its past opposition to the death penalty in the courts—represents a good summary of all the arguments made in the wake of SB 450 becoming law, when most people thought the fight over the death penalty was over.\textsuperscript{207} The article began with humanistic arguments. It claimed the new death penalty law “is mandatory in form, but arbitrary in substance,” and argued that even Deukmejian noticed this arbitrariness, which is why he amended the torture special circumstance out of the bill.\textsuperscript{208} The focus on the

\footnotesize{\textsuperscript{204}“Assemblyman Julian Dixon Won’t Vote for Deukmejian Death Bill,” Los Angeles Sentinel (1934-2005); Los Angeles, Calif., August 23, 1973.  
\textsuperscript{205}Kenneth E. Tucker, “Death Penalty,” Los Angeles Times (1923-Current File); Los Angeles, Calif., January 23, 1973, sec. PART II.  
\textsuperscript{206}Steven Scipes, “Letters to The Times: The Move to Reinstate the Death Penalty,” Los Angeles Times (1923-Current File); Los Angeles, Calif., January 15, 1973, sec. PART II.  
\textsuperscript{207}I did not have access to the committee hearings, but the Senate and Assembly committees responsible for SB 450 took public testimony. The state does not keep records of committee hearings, but some individual legislators do.  
\textsuperscript{208}Coleman A. Blease and Harriet K. Berman, “THE LAW’S FATAL FLAWS: Playing God With the Death Penalty State Is Playing God Again With Capital Punishment,” Los Angeles Times (1923-Current File); Los Angeles, Calif., September 30, 1973, sec. PART VI.}
death penalty’s arbitrary nature was a classic humanistic argument. The title heading on the second page of the article, “State is Playing God Again With Capital Punishment,” employed both humanistic and religious arguments against capital punishment. The humanistic argument was that the state should not execute people—especially its own citizens, as the argument typically goes—and the religious argument was that the state usurped God’s role in determining life and death. The religious outreach is unique among public figures and organizations for the campaign around SB 450. However, the ACLU also argued from the law-and-order framework. Despite earlier in the article complaining, “The death penalty has been twisted and exploited by its promoters into a law-and-order political issue,” the article then argued, the public “have not even obtained the so-called protection they thought they were getting.”209 That the authors felt the need to reject deterrence arguments revealed the influence of the law-and-order framework in the debate. Finally, the ACLU article demonstrated the continued influence of the will of the people argument. The authors argued that the new death penalty law did not reflect the will of the people because Prop. 17 was about restoring the old death penalty law, which allowed for discretion.210 Although anti-death penalty arguments focused on humanistic reasoning and the law-and-order framework, they could not move past the populist reasoning in 1973.

*The Role of the African-American Community*

In addition to the traditional anti-death penalty arguments, opponents of capital punishment increased their outreach efforts to the African-American community in response to the populist, will-of-the-people argument. As explained earlier, Assembly Speaker Moretti’s decision to appoint Julian Dixon, an African-American Democrat in his first term, to the Assembly Criminal Justice Committee was an effort to engage the only demographic group

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209 Blease and Berman, “THE LAW’S FATAL FLAWS.”
210 Blease and Berman, “THE LAW’S FATAL FLAWS.”
opposed to the death penalty. This move was not the only time that anti-death penalty Democrats attempted to gain support from the African-American community on the issue. At a meeting of African-American elected officials from Western states held in the largely African-American area of Inglewood—just outside of Los Angeles, the ideological (if not political) territory of Los Angeles Mayor Tom Bradley, the first African-American mayor of the city—Democratic gubernatorial candidates in the 1974 primary appealed to African-American voters based on their opposition to capital punishment. Moretti said he would not change his stance on the death penalty, regardless of Prop. 17: “‘I don’t mind taking the heat for tough decisions.’” Democratic state Senate Majority Leader George Moscone, took his opposition to capital punishment a step further and weaponized it against one of his opponents in the primary. Referring to Jerry Brown, Moscone expressed his belief that “‘voters will reject a candidate who changes his position on capital punishment because of a voter approved ballot initiative.’” Anti-death penalty Democrats thought their position could win African-American votes.

While Jerry Brown won the Democratic primary and the race for governor in 1974, Moretti’s decision to nominate Dixon to engage African Americans worked. Before Dixon’s appointment to the Assembly Criminal Justice Committee, the Los Angeles Sentinel, the leading African-American newspaper in California, did not run a single article on SB 450 or the death penalty. Following Dixon’s appointment, the Sentinel covered the bill at a similar level to the

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211 In the 1977 poll referenced earlier, African Americans were the only group that had a plurality opposed to the death penalty. Even Democrats supported the death penalty by almost a two to one margin. Field, “ONLY 23% OPPOSE IT.”
212 Richard Bergholz, “3 Democrats Seek Black Support in Gubernatorial Race: BLACK OFFICIALS,” Los Angeles Times (1923-Current File); Los Angeles, Calif., July 1, 1973, sec. PART ONE.
213 Bergholz, “3 Democrats Seek Black Support in Gubernatorial Race.”
214 With 90% of the African-American vote. His selection of Merv Dymally, who was African-American, as his lieutenant governor buoyed the hopes of African-Americans at the time and probably contributed to that result. Brown’s anti-capital punishment views also helped his popularity—Brown did not actually support capital punishment after the initiative; he did say he would enforce any capital punishment law as governor. Jim Cleaver, “A Change of Attitude About Jerry Brown,” Los Angeles Sentinel (1934-2005); Los Angeles, Calif., October 20, 1977; Richard Bergholz, “Brown, Cranston Move to Center in Speeches Before Liberal CDC,” Los Angeles Times (1923-Current File); Los Angeles, Calif., March 11, 1973, sec. Part I.
Los Angeles Times and mainly followed Dixon’s actions. The Sentinel ran articles about Dixon’s appointment to the committee, the committee’s failure to act before the state legislature’s summer recess, Dixon announcing his opposition to SB 450, and Dixon’s comments about SB 450 after Reagan signed it into law. Moretti successfully engaged the African-American community on the death penalty, but he did not prevent the passage of SB 450.

The Sentinel’s increased coverage of the death penalty helped Africans American publicize their views on the issue, via letters to the editor, in greater numbers than in the lead-up to Proposition 17. The arguments of African-Americans in the Sentinel resembled those made in the Los Angeles Times. Some arguments reflected the law-and-order framework, but others were humanistic. One piece from a week after Dixon joined the Assembly Committee represented that duality. The author deplored: “There is a new push for more prisons, tougher sentences, and the restoration of the death penalty—none of which has deterred crime in the past.” The argument about deterrence reflected the law-and-order framework. The rejection of increasing the number of prisons and the length of sentences reflected a rejection of tough-on-crime ideas. Later in the piece, the author claimed the criminal justice system “is shot through with discrimination against the poor and the black.” While not referring specifically to the death penalty, the argument resembled the humanistic view of the arbitrary and discriminatory nature of the death penalty.

The views of African Americans who supported capital punishment also appeared in the Sentinel. One letter to the editor represented this position. After stating some African Americans opposed capital punishment because they thought it targeted minorities, the author stated, “But,
ironically, the worst victims of crime are minorities who don’t have adequate protection against crime.”218 Combined with the author’s assertion, “[T]he attitude of blacks toward law and order deserves the second thought of every black American,” the author was making a law-and-order argument.219 He wanted African-Americans, who were broadly opposed to law-and-order politics, to rethink their lack of support because they were the ones who suffered from crime. Once they rethought law-and-order politics, they should support capital punishment.

1976: Gregg v. Georgia and Rockwell v. Superior Court

With the successful passage of SB 450 in 1973, both sides of the capital punishment debate thought the political fight was over, at least for the moment. The legal fight continued—the ACLU’s article denouncing SB 450 after its passage signaled their intent to challenge to law in court—but the political discussion shifted away from whether California should have capital punishment and to how it should execute.220 By 1976, though, the legal battles threatened to reopen the political fight. In that year, both the U.S. Supreme Court and the California Supreme Court ruled that California’s mandatory death penalty statute, SB 450, was unconstitutional.

Gregg v. Georgia

In early July, 1976, the U.S. Supreme Court issued a ruling in Gregg v. Georgia and its companion cases that aimed to settle the legal debate over capital punishment.221 In contrast to the U.S. Supreme Court’s convoluted ruling in Furman v. Georgia four years earlier, Gregg’s

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219 Mbamalu, “Letter to the Editor 1 -- No Title.”
220 Upon signing SB 450, Reagan said he wanted to investigate whether lethal injection was “more humane.” The Los Angeles Times editorial board ran an article arguing, “there is no humane way to kill a person.” Then there were a series of letters to the editor on the subject of execution method in the Los Angeles Times after the state health and welfare secretary claimed drama was a necessary component if executions were to deter. Sweeney, “Reagan Signs Bill to Restore Death Penalty;” “What’s the Best Way to Kill?,“ Los Angeles Times (1923-Current File); Los Angeles, Calif., October 1, 1973, sec. Orange County; John S. Jensen et al., “Letters to The Times: Drama, Deterrence and the Death Penalty,” Los Angeles Times (1923-Current File); Los Angeles, Calif., October 7, 1973.
mandate was clear. The main thrust of Gregg’s ruling was two-fold: the death penalty did not violate the Eighth Amendment’s ban on cruel and unusual punishment, i.e. it was *per se* constitutional, and sentencing in capital cases had to employ “‘guided discretion,’” rather than the unguided discretion common before *Furman* or the mandatory death penalty between *Furman* and *Gregg.* The reasoning behind both of those holdings is important in separate ways. For the holding that the death penalty is not *per se* unconstitutional, the U.S. Supreme Court determined that capital punishment did not run counter to society’s evolving standards of decency. The Court cited California’s Proposition 17 to show large public support for capital punishment. The holding about guided discretion had a major impact on the design of capital punishment systems. Guided discretion added another part to the death penalty trial. In addition to a guilty verdict on a capital charge and the finding of a special circumstance (in most cases), the fact finder—usually a jury but potentially a judge in a bench trial—had to determine whether aggravating factors outweigh mitigating ones. Because mandatory death penalty statutes did not involve aggravating and mitigating factors—the mandatory aspect meant to eliminate aggravating and mitigating factors—they were declared unconstitutional.

*Rockwell v. Superior Court*

While California’s mandatory death penalty law, SB 450, was not declared unconstitutional as part of the *Gregg* ruling—because the California law was not specifically

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222 For the full *Furman* ruling see: *Furman v. Georgia* 408 US 238 (1972).
226 The case was so influential that *Gregg* is considered the beginning of the modern era of death penalty law.
challenged—its downfall was imminent. In December 1976, the California Supreme Court declared SB 450 unconstitutional in *Rockwell v. Superior Court* (1976). The California Supreme Court interpreted SB 450 to be a mandatory death penalty statute, and, therefore, under *Gregg*, it was unconstitutional. With that ruling, California again lacked a valid death penalty statute, and both sides knew the political fight over capital punishment was about to resume.

**The 1977 Death Penalty Law**

In 1973, because Governor Reagan was a known supporter of the death penalty, the legislature had needed merely to pass a capital punishment bill. Four years later in 1977, Jerry Brown, with his well-known anti-death penalty views, was governor. He was a former Jesuit seminarian who protested outside of San Quentin in 1967 during California’s last execution. Everyone in the state legislature knew a death penalty bill was coming, but Brown preempted the move. Only six days into 1977, Brown announced during his annual State of the State address, that he would “follow his ‘conscience’” and veto any bill to reinstate the death penalty. When Republican state Senator George Deukmejian introduced SB 155 a week and a half later, death penalty proponents knew they needed a two-thirds majority in each chamber to override Brown’s expected veto. In order to garner that two-thirds majority, Republican supporters of capital punishment—the same ones who had supported Prop. 17 and the 1973 law, i.e. Deukmejian, state Senator H. L. Richardson, and state Attorney General Evelle Younger—returned with the same argument that had proven effective in the past, the death penalty was a deterrent. However, they also added new arguments about the dangers of “‘crime-coddling politicians,’” which

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reflected the new tough-on-crime framework. Opponents of the death penalty mixed old and new strategies. On the one hand, they argued based on both the law-and-order framework and humanistic reasoning. On the other hand, they pursued an alternative, life without the possibility of parole, for the first time. The alternative, however, relied on a law-and-order framework too.

The Bill

Before analyzing the arguments about SB 155, it is important to understand the law. SB 155 tried to implement capital punishment in line with Gregg v. Georgia’s mandate. As with the 1973 law SB 450, SB 155 mandated a two-part (i.e. bifurcated) trial, but the parts were different. Under SB 155, the first part of the trial, called the guilt phase, determined guilt and also whether a special circumstance existed. The second part of the trial, called the penalty phase, allowed the jury to weigh aggravating and mitigating factors and decide between life without the possibility of parole and death. The list of capital crimes under SB 155 included: treason, perjury that results in the death of an innocent person, train wrecking resulting in death, deadly assault by a life inmate in which the victim dies within a year and a day, and first-degree premeditated murder. The list of special circumstances in SB 155 included: murder for hire, murder with an explosive device, murder of a peace officer in the line of duty, murder of a witness to prevent testimony, murder committed during the commission of a violent crime, torture, and murder committed by a person previously convicted of murder. Finally, the statute included factors to

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234 The penalty phase of the trial was new and reflected Gregg. In the 1973 law, the first part of the trial focused on guilt, and the second part determined if a special circumstance applied. Under the 1977 law, the first part of the trial focused on guilt and the presence of a special circumstance, and the second part determined whether a person would be sentenced to death or to life without the possibility of parole. “Chapter 316,” California Statutes (1977), 1257.
235 Chapter 316, 1256, 1263, 1265.
236 As with before, these special circumstances only were used in first-degree murder cases. The violent crimes special circumstance included: robbery, kidnapping, rape, child molestation, and burglary. For reference, the murder with an explosive, torture, and murder committed by a person with a previous murder conviction special circumstances were new. The other special circumstances were included in the 1973 law. Chapter 316, 1257-1258.
consider during the penalty phase: the specific circumstances of the crime, past violent criminal acts, the defendant’s emotional and mental strain, victim’s consent to the act that led to the homicide, defendant believing he was morally justified, defendant under the pressure of another, mental impairment from disease or intoxication, defendant’s age, defendant was a minimally involved accomplice, and any other mitigating circumstance a jury member found important.\(^{237}\)

Beyond trial guidelines, SB 155 included appeals instructions and other protections. First, if a jury imposed the death penalty, the trial judge automatically reviewed the sentence and gave written reasons he or she supported the jury’s sentence of death (if the judge supported the jury’s sentence). In addition, the state Supreme Court automatically reviewed the death sentence within 150 days.\(^{238}\) Finally, other protections for defendants included: no death sentence for juveniles and measures against uninformed guilty pleas by defendants in capital and non-capital cases.\(^{239}\)

The bill’s statement of intent gave insight into the reasoning behind the bill:

This act remedies the constitutional infirmities found to be in existing law, and must take effect immediately in order to guarantee the public the protection inherent in an operative death penalty law.\(^{240}\)

The “inherent protection” assertion referred to deterrence, which reflected the law-and-order framework. In addition, the bill continued to allow for a second jury for a finding of a special circumstance.\(^{241}\) As with the 1973 bill, the allowance for a second jury can be viewed in two ways. From a law-and-order perspective, the increased chance of imposing the death penalty increased the deterrence capability of the sentence. From a tough-on-crime perspective, a second trial increased the possibility of a harsher penalty. Further, SB 155 mandated that criminal trials

\(^{237}\) The violent criminal act circumstance included arrests that did not lead to a conviction. Chapter 316, 1259-1260.
\(^{238}\) Chapter 316, 1261-1262.
\(^{239}\) Chapter 316, 1263.
\(^{240}\) Chapter 316, 1266.
\(^{241}\) Chapter 316, 1261.
should proceed through courts before civil trials. Given the other aspects of the bill, this section was based on deterrence logic. According to the general logic of deterrence, any criminal penalty is not a deterrent if justice is too slow. That logic explains why the state Supreme Court was supposed to review death sentence appeals in 150 days. If the state Supreme Court did not review appeals in a timely manner, capital punishment would not act as a deterrent. Since this measure was based on deterrence logic, it reflected a law-and-order framework. In these ways, SB 155 revealed the influence of both the law-and-order framework and the tough-on-crime one.

In other ways, SB 155 was more humanistic than its predecessor, SB 450. Similar to SB 450, the ban on the juvenile death penalty and broad protections against uninformed guilty pleas demonstrated humanistic ideas. The bill also included the murder of an inmate by one serving life as a capital charge, which was a humanistic change from the 1973 law. In addition, since the tough-on-crime framework did not care about poor prison conditions, the inclusion of the murder of other inmates departed from that framework. Despite humanistic elements, the law-and-order and tough-on-crime frameworks predominated, as the debate in the legislature showed.

Two Moves through the Legislature

Regardless of Jerry Brown’s veto threat, a Los Angeles Times survey of state legislators in late January 1977 found that SB 155 was only a few votes short of having the two-thirds supermajority in both chambers needed to override Brown’s veto. As a result, it was not a surprise when SB 155 passed the Senate Judiciary Committee by a vote of seven to two in early

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242 Chapter 316, 1264.
243 Chapter 316, 1262-1263.
244 Chapter 316, 1265.
245 When SB 155 was introduced, it was only two votes short of a two-thirds supermajority in the Assembly with five legislators undecided and only three votes short of a two-thirds supermajority in the Senate with another five legislators undecided. “Death Penalty Rests on Handful of Votes: Survey Finds Bill Would Pass Easily; Chances of Overriding Veto Uncertain DEATH,” Los Angeles Times (1923-Current File); Los Angeles, Calif., January 23, 1977, sec. PART ONE.
March. More surprising, especially given the political dynamics during 1973, was the partisan breakdown of the votes. A majority of committee members from each party supported SB 155, with three Republicans and four Democrats voting in favor of the measure. In addition to one Democrat who voted against SB 155 in committee, a Republican, Senator Milton Marks from San Francisco, also voted against the bill. Marks vote likely reflected his personally progressive politics; later in life, Marks changed to the Democratic Party because the Republicans were not as progressive as when he was originally elected in the 1950s. In 1973, no Republican had vocally opposed the death penalty law (although two had voted against it on the floor), so Marks’s decision to vote against it in committee was significant; it also foreshadowed Marks’s later bill to replace capital punishment with life without the possibility of parole.

Given the strong support for SB 155 in the survey and in committee, the bill’s quick passage in the Senate was not shocking. In early April, SB 155 passed the Senate 29-10 with seventeen Republicans and twelve Democrats in favor and two Republicans and eight Democrats opposed. As with the committee vote, the floor vote reflected weaker Democratic opposition to a capital punishment bill than was present in 1973, which became more apparent in the Assembly. The Senate vote also demonstrated the political importance of the death penalty to Republicans. For some Republicans, capital punishment was the key to winning the 1978

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246 Jerry Gillam, “Death Penalty Bill Approved by Senate Panel: DEATH PENALTY,” Los Angeles Times (1923-Current File); Los Angeles, Calif., March 9, 1977, sec. PART ONE.

247 Gillam, “Death Penalty Bill Approved by Senate Panel.”

248 This was consistently the most liberal Republican in the California state Senate. “Milton Marks; Career S.F. Legislator,” Los Angeles Times, December 5, 1998, http://articles.latimes.com/1998/dec/05/news/mn-50766. His position also may have been based on his constituency. Marks represented San Francisco, and just a year later (as part of Proposition 7 in 1978) San Francisco would earn the distinction of being the only county to vote against the death penalty. As a result, his constituency probably influenced his opposition to capital punishment, although part of it was also based on his personal ideology because of his introduction of the life without parole bill. “Prop. 7 Won Every County Except S.F.,” San Francisco Chronicle, November 10, 1978, San Francisco Chronicle Microfilm Reel Nov. 1 - Nov. 15, 1978, Library of Congress: Newspaper and Current Periodical Reading Room.

249 Gillam, “Death Penalty Bill Approved by Senate Panel.”

250 Jerry Gillam, “State Senate OKs Bill on Death Penalty, 29-10: VOTE ON DEATH PENALTY BILL,” Los Angeles Times (1923-Current File); Los Angeles, Calif., April 1, 1977, sec. PART ONE.
gubernatorial election. For example, John Briggs, a Republican senator from Fullerton, said during the floor debate, “Let's approve the bill. If he (Brown) vetoes it, we should send him out naked in November and go to the people with the death penalty issue and they will throw Jerry Brown out.” While other Republicans knew they had the political upper hand with the issue—Senator H. L. Richardson later brought in signatures from 200,000 residents of California encouraging the legislature to override Governor Brown’s veto—Briggs’s later actions (in June during the veto override vote) showed he was willing to go a step further than his colleagues.

Beyond political considerations, the floor debate demonstrated the influence of the law-and-order and tough-on-crime frameworks on the bill. First, a floor amendment changed the wording of an aggravating circumstance. The original language referred to past violent felony conviction, but the new language was: “significant prior criminal activity.” With that change, a jury would be more likely to find support for the aggravating factor. The floor amendment demonstrated both the law-and-order, i.e. deterrence-based, perspective and the tough-on-crime, i.e. harsher penalty, perspective. Lastly, SB 155 included an urgency clause, so the bill took effect immediately after a veto override rather than on January 1st of the following year.

By early May, the Assembly Criminal Justice committee was ready to act on SB 155. That the committee did not stall action significantly reflected its institutional memory of the public outcry following its decision to stall the 1973 death penalty bill. It also reflected the decreased Democratic resistance to the bill. The committee passed SB 155 by a vote of five to four with three Republicans and two Democrats voting in favor of advancing the bill and four

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251 Gillam, “State Senate OKs Bill on Death Penalty, 29-10.”
Democrats voting against the bill.\textsuperscript{255} The committee did not amend the bill to remove capital punishment and replace it with life without the possibility of parole as it had in 1973. As Frank Vicencia, a Democrat from Paramount and the deciding fifth vote, explained, the committee did not amend the bill because it was clear the bill would be amended to include capital punishment again on the floor. The action would have been politically futile.\textsuperscript{256} Vicencia’s admission characterized the view of many Democrats opposed to capital punishment; they had lost the political fight as the majority of Californians favored the death penalty, so resistance was futile.

In mid-May, when the Assembly passed SB 155, the reasons for less Democratic resistance in 1977 than in 1973 sharpened. SB 155 passed 54-23 with thirty-one Democrats and twenty-three Republicans in favor and twenty-three Democrats opposed.\textsuperscript{257} The Assembly Republicans unified vote showed that Senator Marks was an outlier among Republicans for actively opposing the death penalty. Some Democrats supported SB 155, even if they opposed the death penalty, because they knew they had lost politically. A first term Democrat cast the deciding fifty-fourth vote (the measure needed a two-thirds supermajority before Brown’s veto to activate the urgency clause). He believed any initiative that would result from the bill failing “would be ‘far broader and far worse.’”\textsuperscript{258} A majority of Californians supported the death penalty. Some Democrats realized they would not prevent a new death penalty law, only delay it. The lack of resistance for political reasons is emblematic of the tough-on-crime framework.

Other Democrats actively supported the death penalty, and public support emboldened them. A letter printed in the State Assembly Daily Journal on the day of the override vote shows

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\textsuperscript{256} Gillam, “Death Penalty Bill Passes Tough Assembly Test.”
\textsuperscript{257} Jerry Gillam, “Assembly Votes Death Penalty by Narrow Margin,” Los Angeles Times (1923-Current File); Los Angeles, Calif., May 17, 1977, sec. Part I.
\textsuperscript{258} Gillam, “Assembly Votes Death Penalty by Narrow Margin.”
\end{flushleft}
After the author explained that he was “a Democrat and socially minded liberal,” he stated he was nonetheless “suspicious of the statistics that demonstrate the death penalty has no deterrent effect” and thought the death penalty was necessary “if we are to properly protect our citizens.” Although the letter was from an assembly member’s constituent, it was included in the journal by the unanimous consent of the Assembly. At least one Democrat supported the death penalty from the law-and-order framework, given the reference to deterrence.

The top Democratic elected official in the state, Governor Jerry Brown, however, opposed the death penalty. On the same day the bill passed the state legislature, he followed through on his threat to veto SB 155. Setting aside statistics and other arguments, Brown argued, “[A]t some point, each of us must decide for himself what sort of future he would want. For me, this would be a society where we do not attempt to use death as punishment.” The statement revealed Brown’s humanistic idealism. Some commentators saw the quick veto as a shrewd political move. One political commentator, for instance, thought Brown was trying to decrease public criticism of his veto by hastily acting. Although those commentators did not explain their reasoning, presumably they thought Brown’s veto would be addendum to stories about SB 155 passing the legislature rather than its own separate story.

As earlier votes indicated both chambers already had two-third supermajorities in favor of SB 155, the veto override was not particularly difficult, even though the votes were close. The Senate voted to override Brown’s veto 27-10. Several Republicans used the override vote and the

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263 Gillam and Skelton, “Brown Gives Death Penalty Quick Veto.”
264 Brown’s veto became the main story rather than the bill passing the legislature. If Brown was trying to act politically and deflect coverage of his veto, his strategy backfired.
death penalty issue to their political advantage. Senator H. L. Richardson brought in petitions with 200,000 signatures from his “Law and Order Campaign Committee” to show public support for the override. He knew capital punishment was a winning political issue for Republicans. Senator John Briggs refused to vote for the override (he abstained) because he wanted a death penalty initiative on the ballot when Brown ran for reelection in 1978. He thought keeping the issue alive would hurt Brown politically. Ironically, another Republican, Senator Marks, complained about the death penalty being politicized. After calling the politicization of capital punishment “reprehensible,” he said, “The victims will not come back by taking another person's life and society will not be greater protected.” Beyond revealing Marks’s disgust, his comment showed that humanistic reasons for opposing capital punishment crossed party lines.

Like the Senate, the Assembly overrode Brown’s veto with exactly a two-thirds majority. However, political considerations in the Assembly differed. In the Assembly, political concerns prevented anti-death penalty Democrats from voting against the veto override. The Democratic assemblyman who was the deciding fifth vote in the Criminal Justice Committee was also the deciding vote in the veto override. He opposed the death penalty, but his constituents supported it. They sent him over 2,000 letters supporting the death penalty before the vote. Again some anti-death penalty Democrats thought resistance was futile given strong political support on the issue. The lack of Democratic resistance revealed the effect of the tough-on-crime framework.

Critics of Jerry Brown pointed out that he did little to oppose the override, in stark contrast to past governors who had protected their veto by making concessions on other issues or

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265 Skelton, “Death Penalty Petitions.”
266 Skelton, “Death Penalty Petitions.”
making political threats. Some of those critics even went as far as to say that Brown’s actions were the result of political calculations. Assemblyman Lawrence Kapiloff, a Democrat from San Diego and an opponent of capital punishment, exemplified this view. He argued before the vote:

I don’t think the governor is working to preserve his veto. Why should he? If the veto is upheld, he is in deep political trouble because it will be an issue in the 1978 election campaign. If the veto is overridden, then the people will have the death penalty and the issue will be pretty well buried.

Brown knew the political potency of his criticism of capital punishment and wanted to ensure the death penalty was not be an issue during his reelection campaign. Either way, the passage of SB 155 over Brown’s veto was monumental. It was only the third time in the previous 31 years that a governor’s veto had been overridden in California. Additionally, because of the urgency clause, California again had an operative capital punishment law.

Arguments in Favor

Throughout the entire process, supporters of capital punishment made a variety of arguments in favor of SB 155 specifically and the death penalty in general. Those arguments reflected both the law-and-order framework and the tough on crime one. Supporters’ arguments relied on points that had already proven effective and on newer points, some of which would become more prominent in the future fight over Proposition 7.

In January 1977, Republican state Attorney General Evelle Younger, a longtime supporter of capital punishment, published an opinion piece in response to Governor Brown’s threat of a veto. In it, he relied on a law-and-order framework but also showed new arguments for the death penalty. Younger began the article by arguing “that the death penalty will deter

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269 Gillam, “Death Penalty Veto Overridden.”  
271 Gillam, “Death Penalty Veto Overridden.”
some murders.”272 Younger’s reliance on deterrence revealed the influence of the law-and-order framework. However, his opening argument also contained a new utilitarian argument in favor of the death penalty. He calculated the death penalty “will save more lives than it takes.” Although proponents of capital punishment would not use the argument again widely, the reliance on a utilitarian argument responded to earlier anti-death penalty arguments about the financial costs of capital punishment. Later in the article, Younger attempted to counter a key humanistic argument against the death penalty, that it was applied arbitrarily. Younger explained everything that must happen to sentence a person to death under the new law, which aimed to prevent arbitrariness. He then cited the occupational group of every person on death row to demonstrate that the death penalty was applied equally across economic class. “The occupation[s]…are: 7 business owners or managers, 1 housewife, 35 skilled workers, 11 laborers, 12 unemployed and 3 unknown.”273

Younger’s editorial showed that supporters of the death penalty were no longer content at merely putting forth their own arguments; they also felt the need to counter anti-death penalty arguments. The reason for this change is not entirely clear. Support for the death penalty was even stronger in 1977 than in 1972—71% supported it in the 1977 poll cited earlier compared to 67% of people who voted for Proposition 17 in 1972—so the change was not the result of losing ground. The final argument Younger made was one that first appeared during the debate over the 1973 law, the “will of the people” argument. The results of Proposition 17 and recent polling showed strong support for the death penalty, so Younger stated he would “do everything possible to restore capital punishment in California,” to follow the wishes of the majority.274

[273] Younger did not discuss the argument that the death penalty was applied to racial minorities more than whites because of the context of the article. He wrote the article in response to a Los Angeles Times editorial opposing the death penalty, and that editorial only mentioned the bias based on economic status. YOUNGER, “Younger’s Views on Death Penalty.”
[274] YOUNGER, “Younger’s Views on Death Penalty.”
In 1977, two other public officials, Republican Senator H. L. Richardson and Los Angeles Police Chief Ed Davis, founded a new group, the Law & Order Campaign Committee. The group mixed law-and-order and tough-on-crime arguments. Both the name of the committee, and a letter Davis, the honorary chairman, sent about Brown’s planned veto demonstrated the continued influence of the law-and-order framework. In his letter, Davis stressed deterrence. He implored, “‘Unless you act, and act now, we'll never have a new death penalty bill to adequately protect innocent people from these ruthless murderers.’” The focus on protecting innocents and the fear-inducing tone of the letter were hallmarks of the law-and-order framework. Richardson’s contributions revealed the influence of the new tough-on-crime framework. In a letter asking for contributions to the Committee, Richardson claimed, “‘We're up against criminal-coddling politicians and soft-on-crime social reformers and liberal activist groups.’”

Regular citizens who wrote letters to the editor in support of the death penalty and SB 155 also relied on both the older law-and-order framework and the newer tough-on-crime one. One letter to the editor argued the death penalty helped prevent crime: “If we are to be safe on the streets, we must remove those who make the streets unsafe.” He relied on deterrence, part of the law-and-order framework. However, other ordinary citizens relied on the tough-on-crime framework. For example, one writer in the Los Angeles Sentinel, the African-American newspaper in Los Angeles, argued that most murders “in the U.S. are committed by blacks against blacks.” Further, the author questions, “In the 1920’s and the 1930’s, maybe there was a case for those like the Scottsboro Boys who were the wrongfully accused victims of a racist

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275 Skelton, “Davis Heads Fund Drive to Restore Death Penalty.”
society, but does the same hold true today?” The author questioned opponents’ racial harm argument. He also argued for tougher sentences. A juvenile officer once told him, “‘[T]hese kids on the street could care less if they waste another kid or, for that matter, an adult because they know… the law is not going to do anything to them.’”278 It was a classic tough-on-crime argument. Thus both politicians and ordinary citizens who supported the death penalty and SB 155 made arguments that mixed old, law-and-order arguments with new, tough-on-crime ones.

Polling showed a majority of people overall and a majority of people from every demographic group in the following categories: race, gender, age, geographic region within California, education level, and political party, supported the death penalty with only one exception. A plurality of African Americans opposed capital punishment, but even that was close with 46% opposed to 43% in favor of capital punishment.279 After all the arguments in favor of and opposed to the death penalty, the vast majority of the public supported it.

*Arguments Against*

Opponents of capital punishment also mixed new and old arguments. They employed both humanistic and law-and-order approaches. Opponents also had a new strategy. Rather than being solely reactive in their positions, they proactively presenting an alternative to the death penalty. While opponents had put forth life without the possibility of parole (LWOP) as an alternative before as a footnote of broader arguments, in 1977 they went further and, lead by politicians, attempted to introduce LWOP as a viable legislative alternative.

Anti-death penalty public figures and ordinary citizens mixed humanistic and law-and-order arguments. An Easter statement from a group of Christian leaders compared Christians who support the death penalty to the people who called for Jesus’s crucifixion, but then

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278 Robertson, “L.A. CONFIDENTIAL."
279 Field, “ONLY 23% OPPOSE IT.”
recognized many support capital punishment “‘out of fear and frustration.’”\textsuperscript{280} This statement was important for two reasons. First, the religious leaders recognized the strong influence of the law-and-order framework when they noted the role of fear in many Christians support for capital punishment. Second, the coordinated response of religious leaders stood in contrast to past years. Combined with the strength of the language—the religious leaders were comparing death penalty supporters to the people who killed the Man they claimed as their Lord and Savior—this statement demonstrated religious leaders thought they could exert a greater influence.

Ordinary citizens felt the need to counter law-and-order arguments, which reflected the arguments’ strong influence. The \textit{Los Angeles Sentinel} interviewed African Americans who were stopped on the street during the course of their normal days. One nurse opposed the death penalty because she did not believe it was a deterrent.\textsuperscript{281} Two other interviewees argued that people would not think of the consequences of murder when committing murder in most cases. As a result, the death penalty would not be a deterrent to them.\textsuperscript{282} In a letter to the editor for the \textit{Los Angeles Times}, one woman wrote that she did not believe the death penalty was a deterrent because most murders were committed during a time of temporary insanity.\textsuperscript{283} The focus on countering deterrence arguments demonstrates the influence of the law-and-order framework.

Opponents of the death penalty also relied on humanistic arguments. For example, the day after SB 155 passed the legislature, the \textit{Los Angeles Times} ran an editorial entitled “The Legality of Savagery.” In the piece, the editorial board argued, “Capital punishment, though imposed by law as a penalty for violence, adds instead to the pervasive savagery that defiles this

\textsuperscript{280} \textit{“Death Penalty Foes Recall Crucifixion,”} \textit{Los Angeles Times (1923-Current File)}; Los Angeles, Calif., April 9, 1977, sec. PART 1-A.
\textsuperscript{282} \textit{“Criticize Death Penalty.”}
\textsuperscript{283} Mary Bardes, “Letters to The Times: ‘The Legality of Savagery,’” \textit{Los Angeles Times (1923-Current File)}; Los Angeles, Calif., May 29, 1977, sec. PART VI.
The editorial board made a moral argument against the death penalty. Additionally, as part of the Sentinel interviews, the leader of the Los Angeles branch of the NAACP, Henry Dotson Jr., said he opposed the death penalty on moral grounds and thought it would be applied arbitrarily against the poor and minorities even in its revised form. The focus on the arbitrary nature of the death penalty is a classic humanistic argument against capital punishment. Finally, the letter to the editor from the Los Angeles Times referenced above argued it was easy for a murderer to die because someone who takes another’s life “has been dying for a long time. It's hard as hell to live.” The recognition of the humanity of the murderer revealed a humanistic argument similar to the argument that people murder because of poor personal circumstances. As these arguments show, opponents of the death penalty outside of the state legislature mixed humanistic arguments and arguments that relied on the law-and-order framework.

Inside the state legislature, opponents of capital punishment tried a proactive new technique; they attempted to make life without the possibility of parole (LWOP) a viable alternative to the death penalty. First, a month after the introduction of SB 155, Assembly Speaker Pro Tem John T. Knox, a Democrat from Richmond, and Senator Marks, the leading Republican opponent of capital punishment, introduced bills that would replace the death penalty with LWOP since they knew Governor Jerry Brown preferred LWOP. Brown then took the strategy a step further when he offered to give up his pardon and commutation powers for prisoners serving life terms. With that same action, however, Brown revealed that although

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284 “The Legality of Savagery,” Los Angeles Times (1923-Current File); Los Angeles, Calif., May 20, 1977, sec. PART II.
285 “Criticize Death Penalty.”
286 Bardes, “Letters to The Times: ‘The Legality of Savagery.’”
287 Jerry Gillam, “Death Penalty Substitute Urged,” Los Angeles Times (1923-Current File); Los Angeles, Calif., February 25, 1977, sec. PART ONE.
288 This was a big step because such a change would require a constitutional amendment, which Brown said he would support. George Skelton, “New Twist in Death Penalty Bill Debate: Brown May Be Willing to Give Up
death penalty opponents were proactive with their actions, they were still reactive with their arguments. Brown only offered to limit his pardon and commutation powers in response to an argument made by Senator Deukmejian. Deukmejian charged that LWOP could never truly exist as long as a governor could commute a sentence, and, as proof, Deukmejian revealed that of the seventy-seven people sentenced to LWOP in the 1950s, forty-one had been released by 1977 and two had even committed murder again. Brown was not the only anti-death penalty politician argued retroactively. Assemblyman Knox, upon introduction of the LWOP bill, argued LWOP was a better deterrent because the punishment occurred more quickly. The focus on deterrence revealed the influence of the law-and-order framework.

Despite the proactive legislation and a mix of humanistic and law-and-order arguments, death penalty opponents were ultimately unsuccessful. They did not stop SB 155 and the LWOP bill failed 20-17, one vote short of a majority in the 40-seat chamber. Regardless of their arguments, opponents of the death penalty could not win.

The Push for an Initiative

For supporters of capital punishment, 1977 was a major success. They passed a death penalty bill that would likely be upheld by the courts over the veto of a governor, which was a rare feat. However, their victory was never assured until the final vote was cast on August 11, so pro-death penalty forces planned from the beginning for a possible initiative in 1978. From that back-up plan, the roots of Proposition 7, the 1978 initiative, were born.

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290 Gillam, “Death Penalty Substitute Urged.”
The idea of an initiative began on the same day Jerry Brown announced he would veto any death penalty legislation passed by the state legislature, in early January of 1977. In response to Brown’s veto threat, Senator H. L. Richardson said if no law passed over the governor’s veto, there would be an initiative campaign instead and he promised, “I’ll be right in the thick of it.”

Richardson was right in the thick of it via his Law & Order Campaign Committee. The mailers from the Committee that included the pro-death penalty arguments from Richardson and Ed Davis, the Los Angeles police chief, also included a request for donations. The Committee was trying to raise $300,000 to fund an initiative if it became necessary. By the time that Brown vetoed SB 155, the most vocal Republicans on the death penalty issue, Richardson, Deukemjian, Younger, and Briggs, had all come out in support of the initiative if the veto override failed. But the legislature did override Brown’s veto, so that should have been the end of the initiative discussion.

That was not the end of the initiative discussion. While Richardson, Deukmejian, and Younger celebrated their victory, John Briggs was not ready to give up the idea of an initiative because he thought it would be politically beneficial. Briggs’s desire for an initiative at any cost began when the state Senate voted on the senate override. Briggs abstained from voting for the override hoping it would fail and an initiative in 1978 would be necessary. Why did Briggs want an initiative? He thought it would hurt Brown politically and, therefore, help Republicans. Other Republican leaders on the death penalty issue were furious. As they saw it, Briggs risked innocent lives because he blocked a law to deter murderers. Richardson said, “If it

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292 Skelton, “Brown Pledges to Veto Any Death Penalty Bill.”
293 Skelton, “Davis Heads Fund Drive to Restore Death Penalty.”
294 Gillam and Skelton, “Brown Gives Death Penalty Quick Veto.”
295 Skelton, “Death Penalty Petitions.”
296 Skelton, “Death Penalty Petitions.”
failed because of him [Briggs], I would not be at all surprised if there were a recall…attempt, which I would participate in.” Younger also made thinly veiled comments.297

Even after the state Senate voted to override the veto, Briggs was working on a plan to once again make a 1978 capital punishment initiative necessary. When asked what he thought about SB 155 following the successful Senate override vote, Briggs called it a “‘weak law in the hands of a weak governor.’”298 The implication was clear; a stronger law was necessary and an initiative was the best way to get it. The weak law rhetoric foreshadowed the arguments in favor of Proposition 7. Briggs’s continued push for an initiative was also politically self-serving. By late May 1977, Briggs had already announced his candidacy for the Republican nomination for governor in 1978.299 Since Briggs thought a death penalty initiative would be politically hurtful to Jerry Brown during his reelection effort, Briggs also thought it would be helpful to him as the potential Republican gubernatorial nominee. Briggs’s efforts came to a head in November 1977. A year before any initiative would appear on the ballot, Briggs officially started the drive for what would become Proposition 7.300

298 Gillam, “Senate Overrides Brown’s Veto of Death Penalty Bill.”
**Chapter 3**

**Strengthening Death: Proposition 7 and a Broader Death Penalty**

"Dear Jane. You can protect yourself from the ruthless killers who are walking the streets of San Francisco if you sign this petition and return it to Citizens for an Effective Death Penalty today."

-Letter from California state Senator John Briggs

Near the end of March 1978, hundreds of thousands of registered voters throughout California received similar letters that were customized to include their names and home cities. Briggs, who at the time was a candidate for the Republican nomination for governor, sent the letters as part of his push for a death penalty initiative. Unlike the 1972 initiative, the new 1978 initiative effort was borne out of political ambition. There was no legal or statutory reason for Briggs to start an initiative drive. The state legislature designed the 1977 law based on the United States Supreme Court’s guidelines from *Gregg v. Georgia*, so it was not patently unconstitutional. Instead, Briggs’ floundering gubernatorial bid drove his efforts; Briggs thought the initiative would help his campaign and hurt Jerry Brown’s reelection effort. Regardless of Briggs’s motivation, the letters had their desired effect in relation to the death penalty. By the end of June, nearly 475,000 people had signed the petitions to put a death penalty initiative on the ballot. The battle over Proposition 7 was about to begin.

This chapter of the thesis will examine Proposition 7 in detail. First, the chapter will review the proposed law and official arguments. Then the chapter will investigate popular sentiments towards Prop. 7 through both newspapers and polls. The chapter will argue that Prop. 7 was different from past political and popular conflicts over the death penalty. As with

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Proposition 17 (the 1972 initiative), SB 450 (the 1973 law), and SB 155 (the 1977 law), Prop. 7 demonstrated the influence of a law-and-order framework because of continued reliance on deterrence arguments. The general public feared criminal victimization and, as a result, clamored for deterrence. Prop. 7 also demonstrated elements of the tough-on-crime framework. Proponents of Prop. 7 argued that it was a tough death penalty law. The inclusion of higher sentences for non-capital murders and the increased difficulties in obtaining parole also reflect the shift towards the tough-on-crime framework. This chapter will argue the fight over Prop. 7 demonstrated a change from the law-and-order framework to the tough-on-crime one.

Briggs’s letter set the tone of the campaign as a whole. It contained many references to either past killers or the possibility of killers still being out on the streets. Beyond the reference to “ruthless killers” walking the street of the city in which the recipient lives, a brochure that accompanied the letter reiterated, “‘Your [the recipient’s] life is in danger, killers still walk the streets.’” These lines evoked fear from the recipients, a fear that they could be the next victim. Such fear is a central aspect of the law-and-order framework. The letter also revealed elements of the tough-on-crime framework through its reference to past murderers, in particular Charles Manson. In a line that became a key official argument for Prop. 7, the letter stated that under the operative death penalty law, SB 155, Manson would not have been eligible for the death penalty because he was not the one who actually carried out the murders. Manson was a horrible criminal (one of the worst Californians at the time could remember), but he could not have received what was considered the ultimate punishment. The implication was that SB 155 was not punitive enough because it did not cover Manson. The blend of the law-and-order and tough-on-crime frameworks in Briggs’s letter foreshadowed the official arguments in favor of Prop. 7.

Although there was no official campaign against Proposition 7 at the time of Briggs’s letter—the initiative was not even on the ballot yet—San Francisco Police Commissioner Jane Murphy responded in a letter the *San Francisco Chronicle* published.\(^{307}\) In her response, Murphy highlighted one argument that the official campaign against Prop. 7 would later highlight, but she also held a view on deterrence that the official campaign against Prop. 7 did not. First, Murphy clarified that police work, not the death penalty, kept people safe, which was similar to an argument from the official campaign against Prop. 7 about the necessity of good police work.\(^ {308}\) Such an argument focused on the law-and-order framework’s fear of being the victim of a crime, but shifted the way in which that fear could be combated. Rather than a new death penalty law to reassure people that they were safe, people could rely on a more traditional method, the police. While the importance of police was in-line with official anti-Prop. 7 arguments, Murphy discussed deterrence in a way that the official campaign against Prop. 7 did not. Murphy claimed that there was absolutely no evidence that capital punishment served as an effective deterrent against crime.\(^ {309}\) By rejecting the deterrence argument, she rejected Briggs’s law-and-order framing. While Murphy’s view had empirical support at the time, the official anti-Prop. 7 campaign did not challenge the argument that the death penalty was a deterrent.\(^ {310}\)

**The Proposed Law and Official Arguments**

As part of the initiative process, a qualified proposal was included in a voter information guide. The voter information guide contained: a non-partisan analysis of the law and potential

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307. Murphy was the recipient of the letter at the start of this chapter. “Sen. Briggs: ‘Your Life Is in Danger.’”

308. The difference was that Murphy was asserting that her police officers worked well to protect the public from criminals, but the official campaign against Prop. 7 in the Voter Information Guide said that the new law cannot replace good police work in capturing murderers. “Sen. Briggs: ‘Your Life Is in Danger.’”; “Murder. Penalty-Initiative Statute’ Voter Information Guide for 1978, General Election,” 1978, http://repository.uchastings.edu/ca_ballot_props/844.


costs from the Legislative Analyst’s Office, a text and summary prepared by the Attorney General or the Legislature, and arguments in favor of and against the proposition prepared by the proponents and opponents, respectively. Voters received the guide with the sample ballot. This section of the chapter examines the text and summary of the law and the arguments for and against Prop. 17 contained in the voter information guide to see the influences of the law-and-order and tough-on-crime frameworks. The law reveals a tough-on-crime framework because it increased the possibility of a capital murder conviction and included higher sentences for non-capital murder. The arguments in favor of Prop. 7 showed the frameworks’ influence through the maintenance of the deterrence argument and the increase in the number of death eligible crimes. Arguments against Prop. 7 also demonstrated the shift to the tough-on-crime framework. First, anti-Prop. 7 arguments relied on the framing of Prop. 7 supporters. Second, they did not discuss racial harm arguments, reflecting the colorblindness of the tough-on-crime framework.

The Proposed Law

The new law submitted to voters in Proposition 7 changed the existing death penalty law in many ways. It expanded the types of crime eligible for the death penalty by adding to the list of special circumstances. Specifically, Prop. 7 added special circumstances in the event that the murder: was part of evading capture, involved the death of a public official in relation to that person’s official duty, was heinous, atrocious, or cruel, was a hate crime, or involved torture or poison. While the new categories appeared narrow, some of the factors, such as heinous, atrocious, or cruel, could be expanded to include almost any murder. Expansion was one of

312 If a special circumstance was found in the trial phase of a first-degree murder trial, the trial advanced to a penalty phase in which the jury decided whether to impose the death penalty or life without the possibility of parole.
313 The heinous, atrocious, or cruel special circumstance could be used when the victim died instantaneously (any method that resulted in immediate death could be considered heinous or atrocious) or when the victim did not die
Briggs’s goals. One of his aides explained that, with Prop. 7, it would be nearly impossible for a murderer to avoid facing a capital trial. The expansion of the death penalty demonstrated a desire to increase punitiveness. Prop. 7 further increased the probability of a death sentence during the penalty phase of the trial. Prop. 7 allowed the jury to consider all of a defendant’s past felonies, not just past violent felonies. Further, Prop. 7 allowed for a second and even a third jury to be empaneled for only the penalty phase if the first (and then second) jury was unable to reach a unanimous verdict on punishment. In practice, that rule allowed the prosecution multiple attempts to argue for a death sentence, increasing the chance a death penalty was imposed when compared to a single jury. Juries were also to be instructed that even a verdict of life without the possibility of parole (the only alternative punishment in the penalty phase) could be overturned via the pardon powers of a governor in the future. Prop. 7 attempted, therefore, not only to ensure that murder defendants would reach the penalty phase but also, once at the penalty phase, to ensure a death sentence. Such bloodlust reflected a desire to increase the punitiveness of the criminal justice system and, therefore, revealed the tough-on-crime framework.

The measures in Prop. 7 about non-capital murder also reflected the tough-on-crime framework. The only possible punishment for first-degree murder if the trial does not have a penalty phase, i.e. is not a capital trial, under the 1977 law and Prop. 7 was life with the possibility of parole. However, the difference between the 1977 law and Prop. 7 was the length of time an offender must serve before being eligible for parole; under the 1977 law, an offender was eligible for parole after 7 years, but under Prop. 7 an offender had to serve 25 years before being eligible for parole. The change was similar for second-degree murder. Under the 1977 law,

 instantaneously (because not dying immediately led to suffering, which is cruel). “Murder. Penalty- Initiative Statute,” 132.
314 “Death Penalty Issue on Ballot.”
a person convicted of second-degree murder would be sentenced to five, six, or seven years in prison and had to serve at least two-thirds of the sentence before being eligible for parole. Under Prop. 7, a person convicted of second-degree murder would be sentenced to a minimum of 15 years in prison and have to serve 10 years before being parole-eligible.\textsuperscript{316} As a result Prop. 7 more than doubled the penalties for non-capital murder. The changes in non-capital murder sentences reflected two policies that were key to the tough-on-crime framework nationally, higher mandatory minimums and truth in sentencing. The increased sentence for second-degree murder illustrated the push for higher mandatory minimums. The increase in the length of time that must be served before an offender is parole eligible exemplified truth in sentencing. The connection between the increased sentence lengths and tough on crime is also seen via the estimated impact of the changes. The fiscal impact section of the voter information guide explained that Prop. 7 was estimated to increase the number of people in California prisons (thereby increasing the costs of operating the prison system).\textsuperscript{317} At its height in the 1980s and 1990s, the tough-on-crime framework led to mass incarceration and Prop. 7 was projected to have a similar impact. Overall for both capital and non-capital murder, Prop. 7’s proposed law demonstrated an increase in punitiveness that was at the core of the tough-on-crime framework.

\textit{Official Arguments for Proposition 7}

The second part of the voter information guide included arguments for and against Proposition 7 from supporters and opponents, respectively. Each side also gave a rebuttal. Three supporters and three opponents signed the arguments and the rebuttals. For the pro- Prop. 7 side, John Briggs, Donald Heller, a former federal prosecutor, and Duane Lowe, of the California

\textsuperscript{316} “Murder. Penalty- Initiative Statute,” 32.
\textsuperscript{317} “Murder. Penalty- Initiative Statute,” 33.
Sheriffs’ Association, signed the official arguments.\textsuperscript{318} The pro- Prop. 7 signatories reflected Briggs’ unilateral effort. Neither of the other signatories were involved in the previous three changes to California’s death penalty law, and the people who led those efforts did not sign onto Briggs’s campaign. For the anti-Prop. 7 side, Maxine Singer, President of the California Probation, Parole and Correctional Association, Nathaniel Colley, a board member of the NAACP, and John Brown, a board member of the California Church Council, signed the official arguments.\textsuperscript{319} Each of these anti-Prop. 7 signatories was interesting for different reasons. Singer demonstrated the continued opposition of the California Probation, Parole and Correctional Association; the president of that organization, Edwin Lopez, signed the official arguments against Prop. 17 in 1972.\textsuperscript{320} Colley, as a representative of the NAACP, showed the organization’s opposition to capital punishment and an attempt to reach out to African Americans, as anti-death penalty forces had done in the past. However, as the official and popular arguments will show, anti-Prop. 7 forces did not include racial harm arguments as they had in the past. Anti-Prop. 7 forces wanted African-American votes but also wanted to remain colorblind. Finally, John Brown’s signature reflected the religious opposition to the death penalty.

The official arguments in favor of Proposition 7 reflected the transitional nature of the initiative because they included both the law-and-order and the tough-on-crime frameworks. The official arguments in favor of Prop. 7 on law-and-order grounds comprised both fear mongering and the need for deterrence. The official argument in favor began,

“CHARLES MANSON, SIRHAN SIRHAN, THE ZODIAC KILLER, THE SKID-ROW SLASHER, THE HILLSIDE STRANGLER… They represent only a small portion of the deadly plague of violent crime which terrorizes law-abiding citizens.”\textsuperscript{321}

\textsuperscript{318} “Murder. Penalty- Initiative Statute,” 33.
\textsuperscript{319} “Murder. Penalty- Initiative Statute,” 35.
\textsuperscript{320} “Death Penalty,” 43.
\textsuperscript{321} “Murder. Penalty- Initiative Statute,” 34.
Bringing up the most notorious killers in living memory unsubtly played on the fears of those reading the argument. Since nearly all of those named murdered their victims seemingly at random, they struck fear into entire communities. Referencing them brought back those fears. To ensure the reader understood, the argument continued, “If Charles Manson were to order his family of drug-crazed killers to slaughter your family” (emphasis added), the current law would not protect you—the current law would not apply to Manson. The fear of being a victim of a violent crime underlay the law-and-order framework. In response to this fear, supporters of Prop. 7 suggested the new law would have deterrent capabilities. The argument then cited judges and police officers who said Prop. 7 would be a powerful deterrent. These references to deterring crime and protecting the reader’s family showed the influence of the law-and-order framework.

The official arguments in favor of Prop. 7 based on the tough-on-crime framework were also direct; Prop. 7 provided a tougher death penalty. The argument began with an overview of death penalty legislation since 1972; the key points were that the general public had wanted a tough death penalty the entire time but that they had been thwarted by anti-death penalty politicians. As a result, the 1977 law was “as weak and ineffective as possible.” Even the reference to the idea of being weak on crime evoked the tough-on-crime concept, but the criticism of the 1977 law only served to set up the tough-on-crime description of Prop. 7.

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323 “Murder. Penalty - Initiative Statute,” 34.
324 “Murder. Penalty - Initiative Statute,” 34.
325 In the 1988 presidential election, a political action committee supporting George H.W. Bush notoriously labeled Michael Dukakis, Bush’s opponent, as soft on crime in an ad about Willie Horton. It happened in the middle of the tough on crime and mass incarceration era, so the label of soft on crime was defined as the opposite of tough on crime. For more on the Willie Horton ad, see: Morgan Whitaker, “The Legacy of the Willie Horton Ad Lives On, 25 Years Later,” MSNBC, October 21, 2013, http://www.msnbc.com/msnbc/the-legacy-the-willie-horton-ad-lives.
Proponents promised Prop. 7 would be “the nation’s toughest, most effective death penalty law.” The choice of language reflected on the tough-on-crime framework.

Official Arguments Against Proposition 7

The official arguments against Proposition 7 also reflected the law-and-order and tough-on-crime frameworks because the opponents of Prop. 7 relied on the framing of the initiative’s supporters. First, opponents of Prop. 7 argued the new death penalty law would not stop some of the killers named at the beginning of the proponents’ argument. Instead the opponents of Prop. 7 claimed good police work was needed to apprehend uncaught murderers. While the argument that a new law would not stop the murderers refuted the deterrence argument implicitly, it still suggested law and order was wanting. Police work was lacking, so something needed to change. While this argument is not as strong a form of the law-and-order framework as the supporters’ argument, the opponents of Prop. 7 still implied something was amiss.

The influences of the tough-on-crime framework on the opposition’s arguments are clearer because they tried to show that Proposition 7 was not tough on crime but that the 1977 law was tough. The opposition argued that Prop. 7 cannot “guarantee the automatic execution of all convicted murderers” (emphasis in original). That argument targeted the assertion that Prop. 7 increased the likelihood that a first-degree murderer would be sentenced to death. That increased likelihood was key to Prop. 7’s punitiveness, so opponents attached Prop. 7’s tough-on-crime credentials. Opponents of Prop. 7 sought to bolster the tough-on-crime credentials of the 1977 law. Specifically, the official argument against Prop. 7 claimed, “California already has the death penalty for more different kinds of crimes than any other State in the country.”

326 “Murder. Penalty- Initiative Statute,” 34.
327 “Murder. Penalty- Initiative Statute,” 34.
328 “Murder. Penalty- Initiative Statute,” 34.
Opponents spent valuable space arguing Prop. 7 was not tough because they believed that the tough-on-crime framework was important to the public. 330

The opposition arguments also reflected the tough-on-crime framework because they did not include racial harm arguments. In 1972, one of the main arguments against Prop. 17 was that the death penalty had a racially disparate impact. But the official arguments against Prop. 7 did not mention a racially disparate impact of the death penalty at all. As explained in the introduction, a colorblind framework was a key part of the tough-on-crime framework. Part of the colorblind framework includes not discussing race, so the official anti-Prop. 7 arguments’ failure include racial harm arguments was telling. The opponents of Prop. 7 followed the etiquette of colorblindness and, thus, relied on a tough-on-crime framework.

While many of their main arguments focused on the law-and-order and the tough-on-crime framing of Proposition 7’s supporters, some arguments against Prop. 7 were free from such influences. One argument focused on the constitutionality of Prop. 7. Opponents argued that Prop. 7 was hastily and carelessly written, which would only create confusion and constitutional issues. 331 The constitutionality issue was popular among opponents because the 1977 law had yet to be reviewed by the courts. 332 In addition, opponents made an argument aimed at the public’s pocketbooks. Specifically, the opposition to Prop. 7 argued that the proposed law would require counties to pursue expensive death penalty trials, even when they did not want or could not afford such trials. 333 While these arguments were important, they did not represent a majority of the official argument. Cumulatively the official arguments against Prop. 7 demonstrated the

330 Between their main argument and the rebuttal, each side had less than a page in the voter information guide.
influence of the law-and-order and tough-on-crime frameworks because they relied on the
deterrence and punitiveness frames of supporters and on colorblindness.

**Popular Sentiment - Newspapers**

Outside of the official arguments, most of the discussion about Proposition 7 took place
in newspapers through both editorials and letters to the editor. Few politicians were vocal on the
issue. The two gubernatorial candidates, Democratic incumbent Jerry Brown and Republican
challenger Evelle Younger, had stated views but did not spend significant campaign time on the
issue. Brown was against Prop. 7 because he morally opposed the death penalty, and Younger
was in favor of both the death penalty in general and Prop. 7 in particular.334 When Brown, a
prominent death penalty opponent, was asked why he was not more actively opposing Prop. 7 he
said he did not think he could influence people’s decisions.335 However, it is also possible Brown
did not want to vocally oppose Prop. 7 because it would have hurt his own poll numbers; 60% of
his supporters were in favor of Prop. 7.336 The only major politicians, other than Senator Briggs
himself, to make a vocal public statement on Prop. 7 were a group of city leaders from San
Francisco. In a public press conference called specifically on Prop. 7 Mayor George Moscone,
District Attorney Joseph Freitas, and Supervisors Carol Ruth Silver and Harvey Milk argued that
Prop. 7 was rushed, likely unconstitutional, and would only worsen death penalty inequities.337

The lack of political opposition to Prop. 7, particularly from Democrats, also
demonstrated the influence of the tough-on-crime framework. With the exception of the group of

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Reading Room.
335 “‘TRYING TO CARVE OUT A NEW PATH’: Gov. Brown Campaigns to the Center Governor and the Center
336 George Skelton, “TIMES POLL: 53% Support Restrictions on Smoking PUBLIC SMOKING
San Francisco politicians, no Democrats publically opposed Prop. 7. As they would later at the national level, most Democrats did not oppose and even supported policies born of the tough-on-crime framework. Brown’s lack of active opposition is particularly telling. Brown had previously protested outside San Quentin to try to halt an execution, but now he did not oppose the death penalty to protect his own poll numbers. Democrats at the national level were also protecting their poll numbers when they shifted to support more punitive policies as part of the tough-on-crime framework. As a result, the lack of Democratic opposition, especially from Democratic Governor and gubernatorial candidate Jerry Brown, reflected the tough-on-crime framework.

Because of the dearth of public statements from politicians, newspapers became the main forums in the debate over Proposition 7. Both the Los Angeles Times and the San Francisco Chronicle editorial boards opposed Prop. 7, but only the Chronicle relied on the tough-on-crime framework. The Times editorial board’s arguments were generally humanistic; the board argued the death penalty was morally wrong and arbitrary. The Chronicle’s editorial board, in contrast, argued that the death penalty was not the best way to ensure longer, more punitive sentences.

Beyond those editorials, the Times ran one pro- Prop. 7 column and one anti-Prop. 7 column in its opinion section, but only the pro- Prop. 7 column demonstrated the law-and-order and tough-on-crime frameworks. Finally, the Times had a number of letters to the editor on Prop. 7, nearly all of which supported the proposition. Importantly, the letters to the editor that supported Prop. 7 demonstrated the law-and-order framework, through deterrence arguments, and the tough-on-crime framework, through increased punitiveness arguments. The letter to the editor that opposed Prop. 7 did not rely on the law-and-order or tough-on-crime frameworks. Notably, the Los Angeles Sentinel, an African-American newspaper, barely covered Prop. 7.

Editorials and Opinion Pieces

The editorial boards from both major newspapers in California, the Los Angeles Times and the San Francisco Chronicle, opposed Proposition 7, although their arguments were different. The Times employed a broader, humanistic anti-death penalty stance, but the Chronicle exclusively followed the tough-on-crime framework. The Los Angeles Times editorial opposed the death penalty on the grounds of morality and discriminatory application. The editorial board first argued that civilized societies should not have the death penalty and quoted Albert Camus as justification of its stance. The Times editorial board continued that the death penalty system was arbitrary and that Prop. 7 failed to address such arbitrariness. Specifically, the editorial board argued the death penalty would continued to “be carried out at random, as capital punishment has been imposed in the past, and that under these conditions justice becomes little more than the spin of a roulette wheel.” At first glance, this argument appeared identical to past humanistic arguments that opposed capital punishment because it was racially discriminatory. Upon closer inspection, the racial arbitrariness argument has become an argument based upon arbitrariness alone. The lack of discussion of race reflects colorblind etiquette and, thus, the tough-on-crime framework. Finally, at the end of the editorial, the editorial board responded directly to deterrence arguments, rejecting that the death penalty served as a deterrent because of the length of time between conviction and execution. The Times editorial, therefore, showed humanistic arguments, the tough-on-crime framework, and a response to the law-and-order framework.

The San Francisco Chronicle’s editorial board argued exclusively within the tough-on-crime framework. It agreed stronger sentences were necessary, but claimed Prop. 7 would not ensure such sentences. According to the board, juries were reluctant to impose the death penalty,

340 “Death Penalty: No on 7.”
so they would simply avoid finding a special circumstance. Then, the highest possible sentence would be life with parole. Instead, the editorial board argued that juries should only be given the option of longer sentences without parole to maximize length.\textsuperscript{341} The \textit{Chronicle}’s editorial board wanted harsher penalties, which reflected the tough-on-crime framework.

In addition to the editorials, the \textit{Los Angeles Times} ran pro- and anti- Proposition 7 opinion pieces. Donald Heller, the former federal prosecutor who signed onto the official pro-Prop. 7 arguments, wrote the pro-Prop. 7 piece. Heller mainly explained Prop. 7’s changes to the 1977 death penalty law, but he relied on the tough-on-crime framework in the article’s rhetorical parts. He attacked the 1977 law as the result of compromises with state legislators “who are opposed on principle to capital punishment and stiff prison sentences for criminals.”\textsuperscript{342} Heller accused them of being soft on crime. His argument used the strategy of the official campaign; Prop. 7 was the 1977 law without compromise.\textsuperscript{343} As a result, Prop. 7 followed the will of the people that anti-capital punishment and soft-on-crime legislators had thwarted. The article then made familiar arguments, such as Charles Manson would not be eligible for capital punishment under the 1977 law, but it ended with new arguments. First, Heller argued Prop. 7 would fix the constitutional infirmities of the 1977 law.\textsuperscript{344} He also responded directly to the arguments of opponents. He argued juries could consider the fact that a person did not pull the trigger as a

\textsuperscript{342} Donald H. Heller, “Prop. 7: Do We Need a Stiffer Death-Penalty Statute?: Yes: Californians Want Irrational Loopholes in Current Law Closed,” \textit{Los Angeles Times (1923-Current File)}, October 22, 1978, sec. PART IV.
\textsuperscript{343} Examining the 1977-1978 California State Senate Daily Journal referenced in last chapter, this argument was questionable. SB 155, i.e. the 1977 capital punishment law, never included harsher sentences for non-capital murder. In addition, no special circumstances were removed from SB 155 after it was introduced. See information relating to SB 155 in “California Legislature 1977-78 Regular Session Senate Daily Journal” (State of California,1977).
\textsuperscript{344} Again this is questionable at best. The California Supreme Court did not even rule on the constitutionality of the death penalty in general under the state constitution until 1979 in \textit{People v. Frierson}, let alone the constitutionality of the 1977 capital punishment law specifically. Schwab, “The History of the Death Penalty in California,” 14.
mitigating factor in that person’s Prop. 7 capital trial.\textsuperscript{345} While Heller responded harshly, he felt that the opposition argument warranted a response, a rarity from the pro-Prop. 7 campaign. Heller ended the article by accusing opponents of Prop. 7 of raising “a number of frivolous objections to these improvements in the law.”\textsuperscript{346} That barb reflected the more common approach to discussing opponents of Prop. 7 and the death penalty, people who will stop at nothing to stop capital punishment. Overall, Heller’s article reflected the tough-on-crime framework with its soft-on-crime accusation but also reflected more unique arguments from pro-Prop. 7 forces.

Mary Ellen Gale, a law professor at the University of Southern California and board member of the ACLU of Southern California, wrote the anti-Prop. 7 opinion piece.\textsuperscript{347} As with Anthony Amsterdam in 1972, Gale represented the group of liberal lawyers who opposed capital punishment. Amsterdam was with the NAACP Legal Defense Fund, and Gale was with the ACLU. Gale’s article covered all the anti-Prop. 7 arguments. First, she humanistically argued Prop. 7 “actually invites such discrimination [i.e. racial and economic discrimination] in who receives the death penalty,” and that Prop. 7 “will give California one of the most broad, capricious and savage death-penalty statutes in the nation.”\textsuperscript{348} The first argument challenged the death penalty’s fairness and, because it referenced racially disparate impacts, rejected colorblind etiquette and the tough-on-crime framework. The second argument showed moral objections to the death penalty. Gale next responded to arguments from the tough-on-crime and law-and-order frameworks. She argued, “the state will not acquire the ‘tough, effective death-penalty law’ promised by the proposition's proponents.” Gale then responded directly to the official pro-Prop. 7 argument, stating Prop. 7 “would not ‘protect our families from ruthless killers.’ No death

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\textsuperscript{345} Heller, “Prop. 7: Do We Need a Stiffer Death-Penalty Statute?”
\textsuperscript{346} Heller, “Prop. 7: Do We Need a Stiffer Death-Penalty Statute?”
\textsuperscript{347} Mary Ellen Gale, “No: This Poorly Written Proposal Would Stack Deck in Death’s Favor,” \textit{Los Angeles Times (1923-Current File)}, October 22, 1978, sec. PART IV.
\textsuperscript{348} Gale, “No: This Poorly Written Proposal Would Stack Deck in Death’s Favor.”
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penalty law in history has ever done so.”
She thereby rejected the deterrence argument. That Gale felt the need to respond to the tough-on-crime and law-and-order frameworks demonstrated their influence. Finally, Gale argued that Prop. 7 was unconstitutional. She said, “[T]he voters will trade an existing capital punishment statute which may be constitutional…for one so carelessly written that it is almost certainly unconstitutional as a whole.”
Gale’s opinion piece summarized the variety of arguments made by opponents of Prop. 7.

Letters to the Editor

The letters to the editor from the Los Angeles Times represented the most direct look at the general public’s feelings on Proposition 7. Arguments from supporters revealed both the law-and-order and tough-on-crime frameworks but in different ways from the official argument in favor of Prop. 7. The law-and-order framework arguments demonstrated the same fear and need for deterrence as the official argument. While the author of one letter conceded that it was possible the death penalty was not a deterrent, it was still the “only sure protection the innocent victims of violent crime have,” although he did not explain why that was the case.

This desire to protect the potential victims of crime was similar to thinking on deterrence. The fear that underlay deterrence was based on the fear that innocents would be killed, as seen by the official arguments about a Manson-style killer attacking the reader’s family. Since the reasoning was similar, the letter to the editor’s argument fit within the law-and-order framework.

The letters to the editor reflected the tough-on-crime framework through a connection between Prop. 7’s punitiveness and Biblical morality that called for high penalties. One person wrote that the Bible not only allowed but required capital punishment as a manner of retributive

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349 Gale, “No: This Poorly Written Proposal Would Stack Deck in Death’s Favor.”
350 Gale, “No: This Poorly Written Proposal Would Stack Deck in Death’s Favor.”
justice. Because the Biblical argument also supported increased punitiveness, it fit, broadly, within the tough-on-crime framework.

Only one letter to the editor opposed Prop. 7, and that letter came from a humanistic anti-death penalty stance and, thus, made similar arguments to the *Los Angeles Times* editorial. The letter argued, “Capital punishment is nothing but premeditated, legalized murder.” The morality-based argument resembled the humanistic arguments made by death penalty opponents in earlier eras. The letter also indicated that it was possible to execute the wrong person. The letter then discussed how the death penalty was applied disproportionately to the lower class and racial minorities, especially African-Americans. Notably, the letter was one of the only mentions of racial disparities in capital punishment during the entire campaign. By rejecting colorblind etiquette and mentioning race, this letter explicitly rejected the tough-on-crime framework. The letter concluded by imploring readers to join the civilized world in eliminating the death penalty. This letter rejected deterrence-based arguments and colorblindness, thereby rejecting both the law-and-order and tough-on-crime frameworks of the pro-Prop. 7 campaign.

*The Los Angeles Sentinel*

In contrast to the past three fights over the death penalty, the *Los Angeles Sentinel*, an African-American newspaper, did not include opinion pieces on the death penalty in general or Proposition 7 in particular. The *Sentinel* only included two mentions of Proposition 7 or the death penalty in the entirety of 1978. The lack of coverage, especially in contrast to past years, could be the result of a lack of outreach from the official campaigns, since those campaigns followed colorblind etiquette and did not employ racial harm arguments. Whatever the reason, the two articles that mentioned Prop. 7 demonstrated a mix of humanistic and financial anti-

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354 Rademacher, “Proposition 7: A Stronger Death Penalty.”
death penalty arguments. An ad against Prop. 6, an initiative, also sponsored by Briggs, that aimed to ban the hiring of teachers who were LGBTQ, briefly mentioned humanistic reasons for opposing Prop. 7. The ad accused Briggs of “seek[ing] only convenient scapegoats—not solutions” for Prop. 6 and Prop. 7. In relation to Prop. 7, the ad explained that Briggs wanted to blame the poor and minorities, who disproportionately were sentenced to death, for the issue of crime rather than attacking root causes.\textsuperscript{355} The ad’s argument was about fairness, and, therefore, was humanistic. Also, it is unsurprising that an African-American newspaper included a racial harm argument; when the official campaigns reached out to the African-American community in 1972 and legislators did so in 1973, they relied primarily on such racial harm arguments. Previous anti-death penalty articles in the \textit{Sentinel} also focused on the same issue.

The other article on Proposition 7 in the \textit{Sentinel} followed the work of Dr. William Graves, the Southern District Chairperson of Californians Against Proposition 7. According to the article, Californians Against Proposition 7 was an organization that included religious, community, and professional groups that opposed the death penalty.\textsuperscript{356} In spite of having groups that might have made humanistic (e.g. a religious group concerned with morality) or legal (e.g. professional organization of lawyers) arguments against the death penalty, Graves only made financial arguments. In most of the article Graves explained the changes Prop. 7 made to death penalty law. He later argued, “Taxpayers could be very unhappy” about paying for capital cases for people who were not present when the crime occurred.\textsuperscript{357} As with the other \textit{Sentinel} mention of Prop. 7, the article did not discuss either the tough-on-crime or law-and-order frameworks.

\textsuperscript{357} “Death Penalty Battle On.”
Popular Sentiment - Polls and Results

Pre-Election Polls

Polling also measured popular sentiment related to Proposition 7. Strong majorities favored Prop. 7 from the first poll in late August through the last poll in late October. In late August, San Francisco Chronicle polling found 83% in favor of Prop. 7 compared to 9% against. By late October, the results were slightly less one-sided. The poll found 76% supported Prop. 7 compared to 17% opposed.\(^\text{358}\) A couple of possible reasons can explain the polling shift. First, the Los Angeles Times editorial ran in the middle of October, and the group of San Francisco politicians opposed to Prop. 7 made their announcement at the same time. Some people could have changed their mind in response to those actions. Another possible explanation was changes in advertising from the pro-Prop. 7 campaign. Into early autumn the campaign in favor of Prop. 7 was flush with donations. By early October the donations had fallen off and Briggs had taken on $160,000 in personal debt to try to salvage the campaign’s coffers.\(^\text{359}\) With the campaign in debt, advertising in favor of Prop. 7 would have dropped off, leading to a shift in the polls.

Perhaps because a strong majority of voters favored Prop. 7 throughout the campaign, few polls examined the issues in depth. However, one poll from the Los Angeles Times provided insight into the general public’s support for the initiative. The Times poll asked people whether they supported Prop. 7 in different ways. One form described Prop. 7 exclusively as the death penalty initiative while the other form explained that Prop. 7 would expand the number of death eligible crimes. Support for the first form in late October was 61%, but support for the second

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form was 64%. When people knew that Prop. 7 was more punitive, they supported it in greater numbers. While one could argue people were simply picking the more descriptive option, people would not have picked the more punitive option if they opposed increased punitiveness. The poll demonstrated the influence of the tough-on-crime framework among the general public.

**Results**

Given the landslide margin in favor of Proposition 7 in pre-election polls, the result was not surprising. Proposition 7 won by a margin of 72% in favor to 28% opposed. While this result suggests that the group of undecided voters from the last poll in October voted against Prop. 7, such shifts were clearly not enough. Additionally, as the *San Francisco Chronicle* noted, the results in favor of Prop. 7 mirrored national level polling about support for the death penalty. More in-depth results showed that almost all geographic areas and demographic groups gave majority support to Prop. 7. San Francisco County was the only county in the state to vote against Prop. 7. In addition, an analysis from the *Los Angeles Times* found that Chicanos and African-Americans in Orange County voted overwhelmingly in favor of Prop. 7 despite also voting heavily in favor of Democrat Jerry Brown for governor. Even University of California students, among the most liberal students in the nation, were evenly split on Prop. 7. These results suggest broad support for Proposition 7’s harsher death penalty. The collapse

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of resistance from across the political spectrum, especially in comparison to the results of the 1972 initiative, demonstrates the tough-on-crime framework’s influence.

**Conclusion**

Summarizing the campaign, the *San Francisco Chronicle* noted that Proposition 7 won by a wide margin with “surprisingly little argument or excitement.” The final results were a forgone conclusion, but the reasons for which people supported Prop. 7 were still important. The text of the law and official arguments in favor of Prop. 7 demonstrated the dual influence of law and order and tough on crime. For the most part, the general public supported Prop. 7 for the same reason. On the other hand, only the official arguments against Prop. 7 and the *San Francisco Chronicle’s* editorial used the law-and-order and tough-on-crime framing of supporters. Other opponents of Prop. 7 resisted the influence of those frameworks; instead their arguments explored the moral and practical problems with capital punishment. The election results in favor of Proposition reflected the influences of law and order and tough on crime.

It was not long before the new special circumstances introduced by Proposition 7 were used in a high profile case. On November 27, 1978, a former San Francisco supervisor assassinated San Francisco Mayor George Moscone and Supervisor Harvey Milk in their offices. Two days later, Dan White was charged with two counts of capital murder under the special circumstance that covered murdering elected officials, which Prop. 7 had added to the death penalty statute just three weeks earlier. There was a cruel irony to Prop. 7’s use for Moscone and Milk’s deaths. The proposition’s first high-profile case involved two of the politicians most vocally opposed to it and who represented the one area of the state that voted against it.

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Conclusion and Epilogue: Death’s Challenges

On May 21, 1979, six months after assassinating San Francisco Mayor George Moscone and Supervisor Harvey Milk, Dan White was convicted. White was charged with two counts of first degree, capital murder under Proposition 7’s new special circumstance for killing a public official, but he was only convicted of voluntary manslaughter. At trial, White’s defense team argued depression coupled with consumption of large amounts of junk food—infamously called the “‘Twinkie Defense’”—led to White’s diminished capacity; the jury believed that defense.\textsuperscript{367} The public did not. Even state Senator John Briggs, the sponsor of Prop. 7 and another proposition with anti-LGBTQ goals, said he was “‘shocked…but not surprised’” because of the anti-death penalty sentiment in California.\textsuperscript{368} Briggs’s sentiment was strange considering Prop. 7 easily passed, but he was ever the political opportunist. The LGBTQ community in San Francisco was even angrier; Milk was openly gay and an advocate for the community. Members of the community and their allies gathered in the streets and marched on City Hall. When some protesters destroyed property, the police force—which supported White because he was a former officer—deployed riot police. The ensuing clash became known as the “White Night Riot,” a major event in the LGBTQ struggle.\textsuperscript{369} That event, however, is a different story.

This thesis is about changes in California’s death penalty laws between 1972 and 1978. Specifically, this thesis argues that the two initiatives (Propositions 17 and 7) and two laws (SBs 450 and 155) in that time period reflected a transition from the law-and-order framework to the tough-on-crime one. Three aspects demonstrated the shift between the frameworks. First, the law-and-order framework focused on deterrence, but the tough-on-crime framework focused on

\textsuperscript{368} Hanan, “Harvey Milk/ George Moscone Assassinations,” 511.
\textsuperscript{369} Hanan, “Harvey Milk/ George Moscone Assassinations,” 511.
punitiveness. The propositions and laws reflected the influence of the law-and-order framework because proponents exploited public fears about crime and focused on deterrence to allay those fears. Opponents could not escape the law-and-order framing of proponents and regularly countered the deterrence argument rather than presenting their own arguments. Arguments in favor of the 1977 law and 1978 proposition revealed a desire to increase the harshness of the criminal justice system and stop being soft on criminals. Again, opponents focused exclusively on countering those tough-on-crime arguments. Finally, the 1978 proposition increased sentences for non-capital murders and mandated increased time served before parole eligibility. Those changes exemplified two tough-on-crime policies, mandatory minimums and truth-in-sentencing.

The second aspect that shows the transition between frameworks is a shift away from racial harm arguments and recognition of race. In 1972 and 1973, opponents widely cited racial disparities in death sentences. In addition, in 1972 and 1973, anti-death penalty forces, and to some extent even pro-death penalty forces, explicitly reached out to the African-American community. The use of racial harm arguments and outreach based on race during those campaigns reflects the law-and-order framework. By contrast, in 1977 and 1978, opponents of capital punishment rarely employed racial harm arguments. Further, neither pro- nor anti-death penalty forces explicitly sought the support of African Americans during the fights over the 1977 law and 1978 proposition. Finally, an African-American newspaper, the Los Angeles Sentinel, extensively covered the death penalty issue in 1972 and 1973. By 1977, coverage decreased, and the Sentinel scantly mentioned the 1978 proposition. The disappearance of racial harm arguments and race-based outreach reflects the shift to the tough-on-crime framework.

The third difference between the two frameworks is the level of opposition from liberals and Democrats. Under the law-and-order framework, liberals and Democrats actively opposed
policies, but under the tough-on-crime framework they failed to oppose or even supported policies. In 1972 and 1973, liberals and Democrats actively opposed the death penalty in the press and the legislature. Liberal Democrats in the state Assembly stalled the 1973 law for four months. Contrastingly, in 1977 most anti-death penalty Democrats did little to oppose the bill in the state legislature. By 1978, few liberals and Democrats vocally opposed Prop. 7. Even Governor Jerry Brown, a prominent anti-death penalty activist in the past, was silent—he was running for reelection. The collapse of liberal and Democratic opposition to capital punishment laws for political reasons demonstrated the shift to the tough-on-crime framework.

The shift to the tough-on-crime framework is important because of the consequences of the framework. Tough-on-crime policies led to mass incarceration and destroyed the lives of many people. Especially given the growing consensus that those policies failed, it is important to understand what led to the policies. Only by understanding the rise of the tough-on-crime framework can the U.S. ensure it does not make similar mistakes in the future.

**Epilogue**

History has vindicated many of the critics of Proposition 7. Between 1977 and 1986, the California state Supreme Court reversed 51 of the 54 death sentences under SB 155, i.e. the 1977 law, and Proposition 7.\(^{370}\) In most cases, the Prop. 7 death sentences were overturned because “careless drafting errors created inconsistencies or ambiguities,” even when the California state Supreme Court tried to read the law in the most reasonable manner.\(^{371}\) Opponents of Prop. 7 were right: carelessness made it unconstitutional in many cases. Supporters of the death penalty

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\(^{371}\) Uelmen, “California Death Penalty Laws And The California Supreme Court,” 87.
who opposed Prop. 7 were also vindicated. Every capital case under Prop. 7 could have been prosecuted as a capital case under the 1977 law.\(^{372}\) Prop. 7 was unnecessary.

Proposition 7, regardless of its flaws, was the operative death penalty law. Supporters of capital punishment took measures to ensure death sentences were carried out. In 1986, voters rejected California Supreme Court Chief Justice Rose Bird and Justices Cruz Reynoso and Joseph Grodin in judicial retention elections. Voters believed those justices struck down every death sentence before them because of personal opposition to capital punishment.\(^{373}\) The architect of the recall was none other than George Deukmejian, who by 1986 was governor. Deukmejian made the recall of the justices a key issue in his re-election campaign that year.\(^{374}\) Other key death penalty supporters such as state Senator H.L. Richardson and former Los Angeles Police Chief Ed Davis also staunchly opposed the justices.\(^{375}\) The judicial recall election reveals two related insights. First, death penalty proponents kept relying on popular support in their push to implement capital punishment. Second, California’s Progressive voting mechanisms—i.e. initiative, referendum, and recall—impacted the fight over capital punishment in the state. The law-and-order and tough-on-crime frameworks were visible in California through the Progressive initiative process.

In 1992, six years after the recall of the state Supreme Court justices allowed Governor Deukmejian to shift the Court in favor of the death penalty, California’s first modern-era

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\(^{372}\) Uelmen, “California Death Penalty Laws And The California Supreme Court,” 87.


During that time California underwent a broader transformation and became a leading state in tough-on-crime policies. Between 1979 and 1994, the legislature passed over 1000 bills to lengthen sentences for a wide variety of crimes. Those changes started mass incarceration in the state; the prison population quadrupled from under 30,000 to over 126,000. Two tough-on-crime governors, Deukmejian and Pete Wilson, drove the changes, but they were not alone in their efforts. California’s prison guards union also supported harsher penalties because they increased the necessary number of guards. As the tough-on-crime framework dictated, conservatives were not the only ones pursuing harsher penalties in California. Kathleen Brown—daughter of former Governor Pat Brown and sister of former Governor Jerry Brown—the Democratic opponent of Republican Governor Pete Wilson in 1994, ran a campaign portraying herself as tougher on crime than Wilson. One of her campaign ads explained, “I support the one strike law against rapists, three strikes law against felons, and, as governor, I will enforce the death penalty.” By 1994, even a bona fide California liberal supported tough-on-crime policies.

In some ways, California’s tough-on-crime phase reached its zenith that year. In 1994, the California legislature passed a three strikes law. Under the three strikes law, committing three crimes mandated a sentence of 25 years to life. While the first crime had to be a violent felony, the second and third crimes could be any felony, which would include low-level drug possession and even shoplifting if a certain amount of merchandise was stolen. As a result of the broad definition and mandatory nature of the three strikes provision, it led to a large increase in

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379 Domanick, Cruel Justice, 144.
California’s prison population. Not to be outdone, the prison guard union put an identical three strikes law on the ballot later the same year. Voters overwhelmingly approved the initiative.

Despite overwhelming support at the time, California’s tough-on-crime policies had serious consequences. From 1980 to 2010, the state’s incarceration rate quadrupled. In 2010, California imprisoned roughly 155,000 people. The state was at 200% of capacity, and it was the largest prison system in the United States and third largest in the world. For prisoners, overcrowded conditions were dangerous. For average Californians, overcrowded prisons had financial costs. Because of tough-on-crime policies, the proportion of the state’s budget that went to prisons increased from 3% to 11% between 1980 and 2010. As Governor Arnold Schwarzenegger highlighted in his 2010 State of the State address, the budget increase for prisons led to budget cuts for higher education.

Since that time, California has taken measures to turn away from its tough-on-crime past. Federal courts, including the U.S. Supreme Court, ruled that California’s prisons were dangerously overcrowded and mandated that the prison population be reduced. As a result of those rulings, the state paroled or released to county and local jails over 27,000 prisoners. The Washington Post called it “an act of mass forgiveness unprecedented in U.S. history.”

California did not tackle mass incarceration exclusively because of court mandates. The voters in

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California, who earlier had supported tough-on-crime policies, supported a 2012 initiative to scale back the state’s three strikes law. As it had before, framing played a key role in voters’ decision to shift from supporting a three strikes law in 1994 to reversing one in 2012. In the mid-2000s, the number of stories about prison overcrowding ballooned, which shifted the conversation. A couple of key players also changed positions. Jerry Brown became governor again in 2010, and this time he ushered in legislation to defeated tough-on-crime policies, rather than staying silent. The prison guard union supported Brown’s legislative attempt to address prison overcrowding. As the union told the U.S. Supreme Court in an amicus brief, the overcrowded conditions put prison guards in danger.

While California has made real progress in reversing tough-on-crime policies, not all that glitters is gold in the Golden State. In 2016, California voters approved Proposition 66, which changed death penalty appeals procedure in an attempt to speed up the process. The California Supreme Court, almost immediately, halted the implementation of the changes. While the court case plays out, the lives of the 749 people on California’s death row hang in the balance. They are the misbegotten vestiges of the most recent flow in support for the death penalty that started in the 1970s. Only time will tell if they are saved by the continuation of the 21st century ebb in support for the death penalty or if they are condemned by another voter initiated flow.

389 Clear and Frost, The Punishment Imperative, 146.
391 Percival, Smart on Crime, 197-199.
392 Percival, Smart on Crime, 201.
Appendix 1: Timeline of California Death Penalty Events in the 1970s

Introduction

- January 1972: California Supreme Court strikes down state death penalty law in *People v. Anderson*

Chapter 1

- June 1972: United States Supreme Court decision in *Furman v. Georgia* institutes a nationwide moratorium on the death penalty
- November 1972: California voters approve Proposition 17, which amends California's state Constitution to permit the death penalty

Chapter 2

- September 1973: California Governor Ronald Reagan signs a mandatory death penalty law, SB 450
- July 1976: In *Gregg v. Georgia*, the United States Supreme Court rules that the death penalty is constitutional with guided discretion
- December 1976: California Supreme Court strikes down state's mandatory death penalty law in *Rockwell v. Superior Court*
- August 1977: California legislature overrides veto of Governor Jerry Brown to pass a death penalty law, SB 155, that conforms with U.S. Supreme Court's ruling in *Gregg*

Chapter 3

- November 1978: California voters approve Proposition 7, which enacts a harsher death penalty law and higher penalties for first- and second-degree murder
Appendix 2: Chart Comparing “Law and Order” to “Tough on Crime”

- **Law and Order**
  - Focus on deterrence
  - Can make racial harm arguments
  - Strong Democratic opposition

- **Both**
  - Racially coded language
  - More power to criminal justice system

- **Tough on Crime**
  - Focus on increased punitiveness (higher sentences, less parole)
  - Cannot make racial harm arguments because of colorblind framework
  - Weak Democratic opposition
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