



## Episode 5: An Odyssey in Nebraska

Accompanying episode blurb.

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Jenna Spinelle: I live in one of the biggest, and some say best, college football towns in the country. State College, Pennsylvania, home of the Penn State Nittany Lions. You might know it as Happy Valley. Truth be told, I'm not much of a football fan, but I do love a good tailgate. Burgers, buffalo chicken dip, and cold beer consumed in camp chairs on a crisp fall day, perfection. I've also tailgated at concerts, and even in Punxsutawney, Pennsylvania, on Groundhog day when I was in college. That's a whole other story. I couldn't help but think about tailgates when Colby Coash described an experience he had as a freshman in college at the University of Nebraska Lincoln on September 3rd, 1994.

Colby Coash: The University was just down the road from the state penitentiary, and one day, some of my friends in the dorm said, hey, why don't you come with us, we're going down to the penitentiary.

Spinelle: Colby asked them, what for?

Coash: And they said, well, there's going to be an execution, we're going to go down there.

Spinelle: The execution for a man on death row was scheduled for midnight.

Coash: There's hundreds of people in the parking lot of the penitentiary. There was a lot of police presence there and they had separated the parking lot into two groups. And, one side of the parking lot was for the people who were opposed to the death penalty, and there were several hundred people there praying, holding candles, just being very quiet and mournful about the execution that was about to take place. On the other side, the side that I was on, there were also a couple hundred people, and they were partying, and they had brought coolers, and they were drinking beer, and they were having a cookout, and live music, it felt like a tailgate.

Spinelle: A New York Times article from that year says the crowd of supporters and opponents swelled to 2000.

Coash: It was very surreal because, when they got down to like ten to midnight, somebody had one of those clocks that you would use at New Year's Eve, and they would say, ten minutes, nine minutes, eight minutes, and they went all the way down. And at midnight, the whole crowd that I was on erupted in applause and cheering, celebration. The inmate at that time, he'd been executed.

Coash: It was a pretty ugly scene. And, on the way back, I distinctly remember a very ugly feeling in my heart, that my parents had raised me better than to celebrate someone's death, whether they deserved it or not just. I just felt pretty ugly about being on that side of it. So it was at that time, I said, you know what, I don't really want to be on this side ever again, but I kind of locked that away in a place where you lock away all things you aren't really proud of, and I didn't think about it again.

Spinelle: That is, until Colby Coash found himself in the Nebraska State Senate, where he served from 2009 to 2017. And his experience at the penitentiary as a college freshman came flooding back. In 2015, during his last term in the State Legislature, Colby helped pass legislation to abolish the death penalty in Nebraska, a move later overturned by ballot initiative. In this episode, we'll look at the strange story of the death penalty in Nebraska and ask ourselves when the ballot initiative as a tool of governance does or doesn't support democracy. This is *When the People Decide*, I'm Jenna Spinelle.

Spinelle: What makes this story unusual compared to other initiatives we've talked about so far, is that in Nebraska in 2016, the people voted to override the legislature. The technical term is a veto referendum. Even stranger, the state's Governor helped rally the people to vote against the legislature.

Spinelle: In our series, we've highlighted the times when this process works the other way around. Citizens propose an initiative, and then sometimes the legislature, or the courts intervene to prevent it from being enacted.

Spinelle: As a topic, the death penalty is no stranger to the ballot initiative. Since 1912, the death penalty has been the subject of an initiative 36 times in 15 states. These were efforts to repeal it, reinstate it, or make procedural changes to it.

Austin Sarat: The citizens of the United States, for a very long time, have been deeply invested in the death penalty as a kind of important symbol. A symbol of justice, a symbol of commitment to standing up against so-called evil.

Spinelle: That's Austin Sarat, a professor at Amherst College, who studies the cultural and social life of American Law. In other words, what our decisions about criminal justice say about our society and our democracy. Part of that work involves studying what happens when the question of the death penalty is framed as a ballot initiative. Austin says when voters are in the voting booth, ready to mark yes or no on a ballot initiative question about the death penalty, they're not just expressing policy preferences, they're expressing their values.

Sarat: These death penalty ballot initiatives become symbolic crusades.

Spinelle: Basically, the way you vote on this issue says a lot about you. Austin's main argument is that the death penalty is fundamentally incompatible with democracy, including when it's decided via ballot initiative. He says, a majority decision that does not take into account the rights of a minority, in this case those facing the death penalty, is

not democratic, as a democracy should uphold the quote principles of political equality and human dignity. And yet, the death penalty is put on the ballot often. Here's Nebraska Public Media in 2016, the year it was put before voters in Nebraska.

Nebraska Public...: Nebraska's one of three states where voters face a question about the death penalty on the ballot this year. These votes are part of a still larger picture involving the future of the death penalty nationwide. The questions voters face in Nebraska, California, and Oklahoma are different. In Nebraska, whether to repeal-

Spinelle: The initiative on the Nebraska ballot in 2016 was a veto referendum, it went like this. A retained vote for the measure meant you wanted to keep the ban on the death penalty that the legislature passed. A repeal vote meant you wanted to reinstate the death penalty by repealing the law that had banned it.

Spinelle: Let's untangle this by rewinding one more year to 2015, and the battle to abolish the death penalty in the Nebraska state legislature.

Spinelle: For decades, democratic state Senator Ernie Chambers put the issue of abolishing the death penalty before his fellow Senators. Chambers was a Nebraska state Senator for 46 years, the longest tenure in the state's history. Then came Colby Coash, a Republican.

Coash: It's a majority Republican body in Nebraska, and so, if you were going to get it done, it was going to have to be led by Republicans. The arguments that I used were conservative arguments in my mind. I would talk about the cost of the death penalty and how much, if we as the conservatives in a [inaudible 00:08:37] really about saving taxpayer money, we wouldn't be for this.

Coash: I used a justice argument, at the time it had been 20 years since we had actually executed anybody, and I said, this is inefficient, and this isn't really justice. If the state sentences you to a particular sentence and they don't carry out that sentence for 20 years, that's really not justice.

Spinelle: Colby helped craft a law that would abolish the death penalty, legislative bill 268. Colby said his constituency was blue collar Lincoln, Nebraska. It's 50/50 blue and red, and he said his point seemed to open up the conversation about the death penalty. Still, he usually had one voter in mind when crafting his arguments.

Coash: In Nebraska, I always ran things through to, what would my father-in-law, who's a grumpy old farmer in the middle of Northeast Nebraska, how would he feel?

Spinelle: Colby, along with Ernie Chambers, and 15 fellow state Senators who were co-sponsors on the bill, got to work gathering the votes to pass it into law. There's only one chamber in the Nebraska state legislature, so they were working on their fellow Senators. There was just one hitch.

Paul Hammel: The Nebraska legislature is sort of like the US Congress.

Spinelle: Paul Hammel is a reporter at the Omaha World Herald.

Hammel: You can't get anything pass unless you can overcome a filibuster. Well, that takes a super majority.

Spinelle: That's 33 votes out of 49 Senators. Paul covers state government, the Governor and the prison system. He wrote about the death penalty debate during the 2015 legislative session and the ballot initiative that followed. Paul says he wasn't too sure, watching the legislation to abolish the death penalty, that it had the 33 votes to pass the filibuster. Plus, Nebraska Governor Pete Ricketts had already expressed his opposition to ending the death penalty.

Hammel: Then when it came down to a vote, lo and behold, Ernie Chambers had the votes, and the Governor tried hard, sent his people down there. There's a massive pressure put on, and some threats about, he was a man of means and he wasn't afraid to pay campaign consultants and buy ads to defeat somebody he didn't like. But in the end, Senator Chambers was able to not only overcome a filibuster, but overcome a Governor's yield.

Spinelle: Here's Colby Coash, again.

Coash: We sent it to him with 33 votes. If he vetoed, which we knew he would, we would have to override with 30 votes, which means he would have to pull, or get four people to change their mind, right. And he was successful in getting three of them to do that. And, if he'd have been successful in turning one more person to a no vote, we wouldn't be talking today. So, he certainly had influence.

Spinelle: The law passed over the Governor's veto on May 27th, 2015.

Nebraska Public...: Senator Baker, voting yes. Please. Let's have-

Spinelle: Here's local public radio coverage of the last Senator to cast his vote.

Nebraska Public...: 30 yea's, 19 nay's, on the motion that Legislative Bill 268 become law, notwithstanding the objections of the Governor.

Spinelle: The objections of the Governor though, those did not go away. Here's Republican state Senator Dave Bloomfield in that same Nebraska Public Media clip report from 2015.

Nebraska Public...: If you choose to override the Governor's veto, I'm virtually certain there would be a bill next year to take it to a vote of the people. The people will rise up with the petition drive and get it on the ballot themselves.

Spinelle: Colby said the Governor had already threatened to take this directly to voters.

Coash: We were aware that this was going to be an issue because they tried to use the ballot initiative as a reason not to vote for it.

Spinelle: Paul, the reporter for the Omaha World Herald, explained Governors in Nebraska had always been able to make use of the veto, and observers expected the

fight back and forth about overriding the veto. But before Ricketts, that was where the governing battles ended.

Hammel: We'd never had a Governor like Ricketts, who's a multi-millionaire, who had the means to say, well, I'm going to open up my checkbook and we're going to take it to the people. And of course his father, Joe Ricketts, is wealthy and Conservative. They own the Chicago Cubs, as everybody knows, and Joe Ricketts started TD Ameritrade. And so, we've just never had that dynamic where a Governor not only had political clout, but just this enormous financial cloud.

Spinelle: And Paul said, Governor Ricketts was embarrassed.

Hammel: He got his backside kicked in that first legislative session, not just on the death penalty, but on a couple other issues, he had some vetoes that were overridden. So, I think, this was about saving face. There was a lot of chatter about, well, here's a guy, might be a decent business man, but he doesn't understand how to make politics work. And you know what's wrong with Pete Ricketts? Can he keep those people in line?

Spinelle: The result, referendum 426 to override the legislature's decision to abolish the death penalty. Meaning if it passed, it would reinstate the death penalty in Nebraska. Nebraska Public Media clip covered this part of the story too.

Nebraska Public...: It's a busy weekday morning outside the Lancaster County Motor Vehicle office in Lincoln. "Are you folks registered voters in the state of Nebraska?" "Sure am." "Are you interested in signing the petition to get the death penalty put on the ballot?" "Yes."

Spinelle: Colby Coash began making the rounds with voters using the same arguments that had won his victory among his colleagues in the state Senate. But, he couldn't compete with the biggest megaphone in the state.

Coash: While I'm out there, just me, giving speeches to a couple dozen people, the Governor's out there giving speeches in front of thousands of people. We were relying on small donations and scrapping together as much money as we could. Governor Ricketts would just write, him and his dad would just write checks of a \$100000, \$200000 checks.

Spinelle: Governor Ricketts personally gave \$300000 to fund the campaign that dominated the media attention.

Coash: My Republican principles tell me I'm not really going to tell people what they can do with their own money. I certainly thought it was inappropriate and strange, but it wasn't illegal, so we couldn't make a legal argument. We certainly tried to make it an issue, and I would say things frequently when I was going around the state, and I was like, hey, look, we're here because your Governor lost a policy battle and now wants to undo it with his own money. Doesn't that seem odd? And I would say things like that all the time, but he's a good politician, and he was able to deflect that criticism fairly well. So, at the end of the day, we weren't able to battle that to the extent that could overcome \$300000.

Spinelle: I asked Governor Ricketts for an interview and a spokesperson asked me to send my questions, which I did, but I did not hear back. To get on the ballot, referendum 426 needed signatures from 5 percent of the state's registered voters. The

signatures also had to come from at least 38 of the 93 Nebraska counties. In just a few months, the 426 campaign got more than 10 percent of voters to sign, which meant the new law abolishing the death penalty was also suspended until election day. Paul said, basically the writing was on the wall.

Hammel: The pro-death penalty people were always pretty confident. They had the polling, they saw how successful they were in gathering signatures and getting it on the ballot. The anti-death penalty people thought they had a shot. I think they were hopeful, but maybe not. I don't know if they printed up any victory banners for election night.

Coash: I was fairly certain we were going to lose, and the people were going to vote to reinstate the death penalty, and that's what they did.

Spinelle: Voters elected to reinstate the death penalty in Nebraska with 61 percent of the vote. Governor Ricketts side won.

Hammel: And, the fallout of this was that three Senators who voted to repeal the death penalty, they were targeted by Governor Ricketts and his supporters, Conservatives, for defeat, and they were defeated.

Coash: They got challenged in the election by another Republican, who the Governor got behind with his support and his big checkbook. And three of my colleagues lost their seats, primarily because of this issue and the Governor making it an issue in their reelection campaign. He made the people mad at them and they paid the consequence.

Coash: I think he, this is my opinion, I don't think he liked the independent nature of the legislature rolling over him in gubernatorial veto overrides with such frequency that we did, because we did it three times that year. And, I think that stung for him, and he was pretty resolved to make sure that there was a legislature the following session that wasn't going to do that. And he was successful in that.

Hammel: So, I think there's some reluctance out there to really stick your neck out because it might get chopped off, you may not be back in the legislature.

Spinelle: Colby reached his term limit in 2016. Under state rules, he could have run again in four years, but he did not seek reelection in 2020. He now works as the Associate Executive Director and Director of Government Relations at the Nebraska Association of School Boards.

Spinelle: The Governor and the voters of Nebraska all worked together to beat their own elected officials. What does this say about the ballot initiative as a tool of governance? Colby shared his thoughts with me.

Coash: This is our duty. We are the policy makers. This is what we were sent here to do, and we really can't punt every tough decision from the legislature to the people, that's shirking our duties. People are always going to vote in their own self-interest. If I had a question on a ballot that said, do you want to pay income tax anymore? I'd say no. And so, not that people can't be trusted, but our system is set up to say, hey look, there's a reason we have policy makers because citizens, if we put every change in the law to them, we might have more problems than we're solving.

Spinelle: Not only did voters override what the legislature did in Nebraska through ballot initiative, they've also made deliberate policy choices when elected officials chose not to. Nebraskans expanded Medicaid, expanded gambling, and raised the minimum wage, all with the initiative.

Coash: I was in the legislature when all three of those things came and failed within the body. So, Nebraskans are willing to say, well, legislature, you aren't listening to us, so we will just take this into our own hands.

Spinelle: I want to go back to Austin Sarat, the Amherst College professor. He quotes philosopher John Dewey. If you're thinking of the Dewey decimal system, that's a different Dewey, this one was an education reformer and also wrote extensively on, and believed in, democracy. Dewey thought democracy was more than just a system to cast votes and elect representatives, he thought of democracy as a way for people to relate to, and live with, each other.

Spinelle: Austin Sarat takes this to mean, in part, a common understanding of what a society values. For him, that's a commitment to human dignity, equality, and in his words, reversibility. The death penalty violates all of these principles, he says. So, when the death penalty is upheld by ballot initiative, which it has been the majority of the time.

Sarat: That doesn't say that what we're doing is advancing democracy. It says that majoritarian devices are being used to endorse a practice which cannot be reconciled with democracy. I think that commitments to democracy are not compatible with the maintenance of the practice of capital punishment ... as we used to say in Providence, Rhode Island ... irregardless, of what might happen in a ballot initiative.

Spinelle: The death penalty is still the law in Nebraska. I asked Colby if people still tailgate at executions. He says, there's only been one since the death penalty was reinstated, but-

Coash: They don't do those things at midnight anymore. And, they do it very... I don't want to say very quietly, but there's not much fanfare because they don't want that tailgate atmosphere. So, the state learned their lesson, the Department of Corrections learned their lesson, in that regard.

Spinelle: I believe that for a ballot initiative to be successful and democratic, it should be grounded in what John Dewey described as the democratic way of living. A way that takes everyone's rights into consideration. Some of those stories we've already heard, and we'll hear more in the last half of the series.

Spinelle: But, ballot initiatives make legislators nervous. Colby Coash felt that way during the campaign to reinstate the death penalty. Legislators across the country are in the same boat, and some are trying to make it harder for citizens to use the initiative as a force for political change. We'll hear more about that in upcoming episodes, too.

Spinelle: When the People Decide is produced by LWC Studios for the McCourtney Institute for Democracy at Penn State. The podcast is reported and hosted by me, Jenna Spinelle. Our producer is Paulina Velasco, Veralyn Williams edited this episode, Cedric Wilson mixed this episode, fact checking by Mark Betancourt. You heard archival footage in this episode from Nebraska Public Media. Thank you to the Penn State University

libraries for access to Austin Sarat's book, *The Death Penalty on the Ballot*, and all the other books referenced in this series. Follow *When the People Decide* on social media @peopledecidepod and leave us a review, so more people can find us. I'm Jenna Spinelle, thanks for listening.

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