

A SURVEY OF THE HISTORY OF THE DEATH PENALTY IN THE UNITED STATES

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INTRODUCTION

Since the founding of Jamestown Colony in 1607, few topics in American life and culture have generated as much controversy, both in terms of persistence and volatility, as the death penalty. Foreign policy, economic recessions, and social movements come to the forefront of national discussion in their own respective ebbs and flows. Capital punishment, however, has been a staple of the American criminal justice system since the early inhabiting of the continent, and has remained a permanent vehicle through which we can enact retribution on the most heinous criminal offenders in our society, ridding ourselves of the worst among us.

I. THE DEATH PENALTY: FROM THE FOUNDINGS THROUGH NINETEENTH CENTURY AMERICA

The American colonists inherited their use of capital punishment from Great Britain, although the American colonists were more conservative than their English counterparts in many re-

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spects.¹ In early America, the number of offenses that could potentially warrant the death penalty was substantially more expansive than would be socially and constitutionally acceptable today.² Take adultery, for example. In 1644, the Massachusetts Bay Colony executed Mary Latham and James Britton for “betray[ing] [Latham’s] elderly husband and boast[ing] of it.”³ And while some laws punishable by death, including theft and rebelliousness of children, were generally “bark and no bite,”⁴ others, such as murder and rape, unequivocally warranted the death penalty.⁵

The death penalty was also a commonplace punishment for criminal recidivism in early America. For example, an early Virginia law imposed the death penalty for a third stealing offense.⁶ Specifically, a first offense for stealing another’s hog was “worth twenty-five lashes and a fine; the second offense meant two hours in the pillory, nailed by the ears, plus a fine. The third offense brought death.”⁷ Similarly, in Massachusetts, “a first-time burglar was to be branded on the forehead with the letter B; a second offender was to be branded and whipped,” but a third offense would trigger the death penalty, as the individual was labeled “incorrigible.”⁸

However, not only was there a draconian breadth as to which actions could be punished by death in the colonial period, there was also an aspect of arbitrariness in capital punishment, and punishment in general. For example, and somewhat interestingly, child rape was not originally a capital offense because it was not, “biblically speaking, a capital crime.”⁹ In one Massachusetts Bay child rape incident, instead of execution, the perpetrator’s “nostrils were slit and seared” and he was ordered to wear a

1. LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 41 (1993).

2. The Eighth Amendment, ratified in 1791, established a prohibition against “cruel and unusual punishment.” U.S. CONST. amend. VIII.

3. FRIEDMAN, *supra* note 1, at 41.

4. *Id.* One reason that the colonies used the death penalty more sparingly than the British was that some colonies, like Massachusetts Bay, had rules that prevented any death sentence “without the testimonie [sic] of two or three witnesses.” *Id.* at 42–43.

5. *See id.* at 42.

6. *Id.*

7. *Id.*

8. *Id.* at 44.

9. *Id.* at 42.

noose around his neck.¹⁰ The General Court of Massachusetts later made both rape and statutory rape capital offenses.¹¹

Additionally, there was no general consensus among the colonies about how often to impose the death penalty. Before 1660, there were fifteen executions in Massachusetts: four for murder, two for infanticide, two for witchcraft, three for sexual offenses, and alarmingly, four individuals were executed simply for being Quakers.¹² In Pennsylvania, the rate of execution was about one per year until the American Revolution.¹³

For better or worse, the death penalty was a staple of criminal justice in early America; it was both widely accepted and largely uncontroversial.¹⁴ Historians have rightly noted that given early Americans' understanding of the Bible, common law, and historical criminal codes, "relaxed Virginia Anglicans like Thomas Jefferson and James Madison or dour Calvinist New Englanders like Fisher Ames and the Adamses [would have likely seen the death penalty] not only as historically commonplace but [also] as intrinsically just and . . . divinely prescribed."¹⁵

The plain language of the Fifth Amendment is compelling evidence of this fact. The Fifth Amendment states, "No person shall . . . be deprived of life, liberty, or property" although with the very important caveat, "without due process of law."¹⁶ In other words, the framers of the Constitution understood and agreed that life *could* be constitutionally taken assuming there was due process of law. Thus, "[t]he first generations of Americans after independence . . . inherited without question the view that the death penalty was a harsh penalty, but *not* a cruel or unusual one."¹⁷

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. See generally JOSEPH A. MELUSKY & KEITH A. PESTO, CRUEL AND UNUSUAL PUNISHMENT: RIGHTS AND LIBERTIES UNDER THE LAW 29–38 (2003) (explaining both the roles of religion and history in the shaping of retribution and capital punishment in early America).

15. *Id.* at 29–30.

16. U.S. CONST. amend. V.

17. MELUSKY & PESTO, *supra* note 14, at 35 (emphasis added).

As American society evolved from its predominantly religious beginnings, humanitarian ideals, such as proportionality and the freedom of deprivation, began to take effect and capital punishment was drastically affected.¹⁸ Colonial governments were more ambitious in infusing new ideologies into previously “draconian criminal codes.”¹⁹ Pennsylvania’s constitution, for example, outlined that punishments should be “less sanguinary and in general more proportionate to the crime.”²⁰ The preamble to Pennsylvania’s murder statute in 1794 further stated that “the punishment of death ought never to be inflicted where it is not absolutely necessary to the public safety.”²¹

In the majority of post-Revolution states, there was a dramatic decrease in the number of offenses that warranted the death penalty.²² Many states reduced the list of capital offenses to murder, rape, or treason.²³ In 1796, Virginia went further and abolished the death penalty for “all crimes committed by whites except premeditated murder.”²⁴

As general sentiment against the death penalty increased, Americans began to reevaluate proportionality and humanitarian concepts in the methods of execution as well. In early America, as in England, public hangings were the most common method of execution.²⁵ Public hangings both served as deterrents and symbols of municipal or societal power.²⁶ Of course, public hangings were at the forefront of one of the most recognizable historical events of the pre-Revolutionary period—the Salem Witch Trials,

18. THE OXFORD COMPANION TO AMERICAN LAW 26 (Kermit L. Hall ed., 2002) [hereinafter OXFORD COMPANION TO AMERICAN LAW]. While John Locke’s philosophies had an enormous impact on this reformation, it should be noted that “Locke and his American following never questioned the assumption that the power of the state extended to life and death,” as he was “concerned [primarily] with the allocation of the state’s power and its proper ends, not its extent.” MELUSKY & PESTO, *supra* note 14, at 35.

19. MELUSKY & PESTO, *supra* note 14, at 36.

20. *Id.*

21. *Id.*

22. OXFORD COMPANION TO AMERICAN LAW, *supra* note 18, at 26.

23. *Id.*

24. *Id.* Even before 1796, Thomas Jefferson proposed limiting capital punishment in Virginia to treason and murder. FRIEDMAN, *supra* note 1, at 73. For the offenses of rape and sodomy, Jefferson proposed castration. *Id.* Jefferson was also a proponent of strict “eye for an eye” retribution in cases of maiming or disfiguring. *See id.*

25. FRIEDMAN, *supra* note 1, at 41.

26. *Id.* at 76.

in which nineteen people were hanged in the summer of 1692 for witchcraft, and another pressed to death by stones, among mass societal hysteria.²⁷ However, the post-Revolution and Republican periods introduced a calculated shift away from public hangings.²⁸ This movement was defined by a stark move away from corporal punishment with an emphasis on confinement.²⁹

Before this shift, confinement was primarily used to hold individuals awaiting trial or punishment; it was rarely used as a means of punishment *in se*.³⁰ The once predominantly public nature of punishment gave way to less theatricality and more privacy.³¹ After the American Revolution, “[t]he walled-off penitentiary replaced the pillory and the whipping post; and most states abolished the public festival of hanging.”³²

At the turn of the nineteenth century, both religious leaders and enlightened idealists, such as Benjamin Rush, advocated for complete abolition of the death penalty.³³ This support waned during the mid-nineteenth century in part because the public paid more attention to the anti-slavery movement, the Civil War, and Reconstruction.³⁴ In the late nineteenth century, some states, like New York, initiated a move in bringing the methods of execution “up to date.”³⁵ In 1888, New York introduced the electrical chair in an attempt to abolish the hangman and noose, which was viewed as more barbaric.³⁶ A select number of states even at-

27. *Salem Witch Trials*, HISTORY, <http://www.history.com/topics/salem-witch-trials> (last visited Feb. 27, 2015).

28. FRIEDMAN, *supra* note 1, at 73 (“One very notable aspect of reform in the period of the republic was the movement to get rid of the hangman.”).

29. *See id.* at 76–77.

30. *See id.* at 77.

31. *See id.* at 75–76.

32. *Id.* at 75. Of course, the public nature of executions was never fully privatized, as newspapers of the late nineteenth century used the power of the press to describe “the major executions in lip-smacking detail.” *Id.* at 170.

33. *Id.* at 73–74.

34. *Part I: History of the Death Penalty*, DEATH PENALTY INFO. CTR., www.deathpenaltyinfo.org/part-i-history-death-penalty#earlymid (last visited Feb. 27, 2015) [hereinafter *Death Penalty History*]; *see also* FRIEDMAN, *supra* note 1, at 93–97 (noting that with the Reconstruction came numerous attempts by Southern states to retain as much legal subjugation of former states as possible, which in turn focused much attention on addressing these issues).

35. FRIEDMAN, *supra* note 1, at 170.

36. *See id.* at 170–71.

tempted full abolition of the death penalty.³⁷ Notwithstanding, the death penalty remained in force across the vast majority of the country.

II. THE DEATH PENALTY IN TWENTIETH AND TWENTY-FIRST CENTURY AMERICA

A. 1900–mid-1950s

The Progressive Era (1900–1918)³⁸ marked a new chapter in death penalty reform. Among issues involving big business monopoly and the destitution of immigrants, this era experienced an atmosphere of increasing fervor for legal reform favoring the abolition of the death penalty.³⁹ During this period, ten U.S. states abolished capital punishment: Minnesota, North Dakota, Colorado, Oregon, Washington, Kansas, South Dakota, Missouri, Arizona, and Tennessee.⁴⁰ The work of individuals, organizations, the press, and state governments helped accomplish abolitionist victories.⁴¹ Even those states that did not wholly abolish the death penalty faced substantial abolition pressure during the Progressive Era.⁴²

37. *Id.* at 74.

38. The Progressive Era is characterized as a period during which activist middle-class citizens worked to fix various societal problems that had accompanied industrialization and urbanization at the turn of the twentieth century. *American Experience: The Progressive Movement (1900–1918)*, PBS, <http://www.pbs.org/wgbh/americanexperience/features/general-article/eleanor-progressive/> (last visited Feb. 27, 2015).

39. *Id.*

40. JOHN F. GALLIHER ET AL., *AMERICA WITHOUT THE DEATH PENALTY: STATES LEADING THE WAY* 79 (2005) [hereinafter GALLIHER ET AL., *STATES LEADING THE WAY*].

41. In five of these ten states (Arizona, Kansas, Oregon, South Dakota, and Washington), for example, governor lobbying strongly catalyzed anti-death penalty legislation and were affiliated with the Anti-Capital Punishment Society of America, one of several abolitionist organizations that emerged in the Progressive Era. John F. Galliher et al., *Abolition and Reinstatement of Capital Punishment During the Progressive Era and Early 20th Century*, 83 J. CRIM. L. & CRIMINOLOGY 538, 547, 559 (1992) [hereinafter Galliher et al., *Progressive Era*]. Press outlets in Colorado and Minnesota also furthered the abolitionist agenda by publishing stories accounting the harsh and grisly details of executions. *Id.* at 552–53.

42. See generally William E. Ross, *The Death Penalty—Reasons for Its Abolition*, 11 VA. L. REG. 625, 626 (1905) (publishing a paper outlining the reasons the death penalty should be abolished in Virginia). The Virginia Law Register argued that the death penalty is a failed deterrent that has proven not to prevent violent crime, and warned that an irrevocable punishment such as death is unwise and unfair when administered by fallible citizens who could potentially condemn the innocent. *Id.* at 630, 632.

Nonetheless, despite abolitionist victories early in the twentieth century, death penalty reforms proved to be temporary. Of the ten abolitionist states, only two, Minnesota and North Dakota, did not immediately reinstate the death penalty in this post-Progressive period.⁴³ The resurgence in support of capital punishment was partly a result of a societal frenzy in the aftermath of the Russian Revolution, World War I, and intense conflicts aimed against capitalism.⁴⁴

Moreover, a general decline in societal well-being helped spur reinstatement. Excluding Colorado, all the states that reinstated the death penalty during this period did so during either the recession which immediately followed the end of World War I, or the 1930's Great Depression.⁴⁵ The notion that crime would accompany poverty and unemployment⁴⁶ strengthened society's view that the death penalty was "a necessary social measure."⁴⁷

In fact, the 1930s saw more total executions, 1676, than any other decade,⁴⁸ and there was no significant opposition to the death penalty.⁴⁹ Among them, the hanging of Eva Dugan in 1930, the first woman executed in Arizona, brought about reform in terms of methods of execution.⁵⁰ In a botched hanging, "Dugan's head was ripped from her body," causing states to consider the cruel nature of hanging, and therefore to move towards other methods.⁵¹ The 1940s experienced only a slight decline in executions, with 1289 total executions.⁵²

43. GALLIHER ET AL., STATES LEADING THE WAY, *supra* note 40, at 79.

44. *Death Penalty History*, *supra* note 34.

45. Galliher et al., *Progressive Era*, *supra* note 41, at 543, 575 (noting that "during economic booms, the convict population was a resource to be exploited through such policies as a convict labor system, but during recessions, these same convicts became a threat that encouraged reliance on capital punishment").

46. *Id.* at 575.

47. *Death Penalty History*, *supra* note 34. Public vigilantism also increased during the economic recessions in the form of lynching, encouraging governments to reinstate the death penalty to restore order and end street justice. Galliher et al., *Progressive Era*, *supra* note 41, at 563.

48. ROBERT M. BOHM, DEATHQUEST: AN INTRODUCTION TO THE THEORY AND PRACTICE OF CAPITAL PUNISHMENT IN THE UNITED STATES 164 (2012).

49. CHRISTOPHER S. KUDLAC, PUBLIC EXECUTIONS: THE DEATH PENALTY AND THE MEDIA 19 (2007).

50. *Id.*

51. *Id.*

52. BOHM, *supra* note 48, at 12.

By 1950, the electric chair had become a prevalent method of execution in twenty-six states.⁵³ Still by 1955, eleven states had introduced death by asphyxiation—pumping poisonous gas into gas chambers—as a more humane way of execution.⁵⁴ With newer, more sophisticated methods of execution on the rise, an increasing number of states began to view death by hanging as “barbaric” and “cruel.”⁵⁵ Indeed, domestic discourse on the death penalty began to mirror international discussions focusing on the suffering of prisoners on death row.⁵⁶ The newer methods of execution became more appealing as they were believed to be less painful to the prisoner and less visually disturbing to onlookers.⁵⁷ These new methods also meant new means of administration. Ordinary individuals could no longer conduct executions; specialists equipped with the knowledge to operate the new equipment became a necessity.⁵⁸ By the middle of the twentieth century, only a handful of states maintained the practice of sentencing prisoners to the gallows to die.⁵⁹

B. 1955–Furman v. Georgia

Between 1955 and the Supreme Court of the United States’ 1972 ruling in *Furman v. Georgia*, which suspended the use of

53. STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 169 (2002).

54. *Id.*; *Death Penalty History*, *supra* note 34. Nevada’s Gee Jon was the first individual executed by cyanide gas in 1924. *Id.* After the State unsuccessfully tried to poison Jon by pumping cyanide gas into his prison cell, they constructed the gas chamber. *Id.*

55. BANNER, *supra* note 53, at 169. Instances of nooses slipping off of prisoners’ necks, half strangling, or worse, severing their heads from the rest of their bodies, prompted official efforts in the late 1800s to modify hanging protocols. *Id.* at 173. In the hanging of James West, blood trickling from his nose and mouth colored the white hood used to wrap his face. *Id.* In another example, Samuel Frost’s head was nearly decapitated, with only a few ligaments connecting it to the rest of his body, causing an uncontrollable gush of blood. *Id.*; see also Tom Zeller, Jr., *The Not-So-Fine Art of Hanging*, N.Y. TIMES (Jan. 16, 2007, 5:13 PM), http://thelede.blogs.nytimes.com/2007/01/16/the-not-so-fine-art-of-hanging/?_r=0 (noting that in a hanging, the height of the drop is determinative of the prisoner’s death, ranging from asphyxiation to “a snapping of the neck”).

56. KUDLAC, *supra* note 49, at 19; Richard C. Dieter, *International Perspectives on the Death Penalty: A Costly Isolation for the U.S.*, DEATH PENALTY INFO. CTR. (1999), <http://www.deathpenaltyinfo.org/international-perspectives-death-penalty-costly-isolation-us> (last visited Feb. 27, 2015) (noting that the rate at which countries have abolished the death penalty nearly tripled over the latter half of the twentieth century).

57. BANNER, *supra* note 53, at 169.

58. *Id.* at 169–70.

59. *Id.*

the death penalty in the United States,⁶⁰ there was a significant decline in the use of capital punishment.⁶¹ Support for capital punishment hit a record low of 42% by 1966.⁶² Several prominent issues during this period, including the civil rights movement (1955–1968) and the Vietnam War (1955–1975), swayed public conscience away from killing.⁶³ As in the Progressive Era, abolition occurred in a state-to-state, piecemeal fashion. Between 1957 and 1969, Hawaii, Alaska, Delaware, Michigan, Oregon, Iowa, New York, West Virginia, Vermont, and New Mexico abolished the death penalty.⁶⁴ Apart from this moral impetus for reform, the abolition of capital punishment began to gain legal merit as authorities questioned whether the death penalty violated the Eighth Amendment’s protection against cruel and unusual punishment.⁶⁵

Nine months before *Furman*, the Court ruled in *McGautha v. California* that allowing a jury to decide whether to prescribe death or life imprisonment in capital convictions was not unconstitutional, rejecting claims that giving the jury “unfettered . . . discretion in imposing death for murder” was arbitrary and capricious.⁶⁶

However, in *Furman*, the Court found the death penalty unconstitutional on the grounds that it violated the Eighth Amendment’s prohibition on cruel and unusual punishment.⁶⁷ This ruling rattled the once stable notion that the death penalty did not constitute cruel and unusual punishment.⁶⁸ In some respects, the Court’s decision in *Furman* was inevitable given its move away from fixed and historical meanings previously used to determine what punishments qualified as cruel and unusual.⁶⁹ In *Trop v.*

60. *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972) (per curiam).

61. See TRACY L. SNELL, U.S. DEPT OF JUST., CAPITAL PUNISHMENT, 2012—STATISTICAL TABLES 3 (2014), available at <http://www.bjs.gov/content/pub/pdf/cp12st.pdf>.

62. ALAN ROGERS, MURDER AND THE DEATH PENALTY IN MASSACHUSETTS 355 (2008).

63. KUDLAC, *supra* note 49, at 19.

64. PHILIP E. MACKEY, VOICES AGAINST DEATH: AMERICAN OPPOSITION TO CAPITAL PUNISHMENT, 1787–1975 xliii–xlix (1976).

65. BOHM, *supra* note 48, at 43–44.

66. 402 U.S. 183, 205 (1971); BOHM, *supra* note 48, at 50.

67. *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972) (per curiam).

68. See Corinna Barrett Lain, *Deciding Death*, 57 Duke L.J. 1, 8–9 (2007).

69. See *Supreme Court Review 1972: Cruel and Unusual Punishment*, 63 NW. J. CRIM. L., CRIMINOLOGY & POL. SCI. 463, 484 (1972).

Dulles, for example, the Supreme Court found that stripping a soldier of his citizenship in response to his desertion during World War II constituted cruel and unusual punishment.⁷⁰ In the decision, the Court referenced the 1910 decision in *Weems v. United States*, in which it found that a punishment of twelve years of hard labor for falsifying documents was cruel and excessive.⁷¹ The *Trop* court stated, in the context of *Weems*, “that the words of the [Eighth] Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”⁷²

Despite *McGautha*’s refusal to find the death penalty arbitrary and capricious, the defense in *Furman* argued unconstitutionality on the grounds of both the Eighth and Fourteenth Amendments, and succeeded in suspending capital punishment across the country.⁷³ The *Furman* Court ultimately held that the capital punishment statutes at issue were unconstitutional because they left to the jury’s discretion the decision to impose death, in violation of the Fourteenth Amendment right to due process and the Eighth Amendment ban on cruel and unusual punishment.⁷⁴ In one fell swoop, *Furman* abolished every death penalty statute across the country and “spared the lives of every man and woman on death row.”⁷⁵ Six hundred inmates across thirty-two states had their death sentences commuted to life imprisonment.⁷⁶

The abolition of the death penalty in *Furman* was by no means an easy and uniform decision for the Justices on the Court. All nine Justices wrote a separate opinion.⁷⁷ For Justice Brennan, the death penalty was “cruel and unusual” in all situations as “a denial of the executed person’s humanity.”⁷⁸ For Justice Stewart, death sentences were “cruel and unusual” only under current laws in the “same way that being struck by lightning is cruel and

70. 356 U.S. 86, 101 (1958).

71. *Id.* at 100–01 (citing 217 U.S. 349, 382 (1910)).

72. *Id.* at 100–01.

73. *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972) (per curiam).

74. *Id.*; BOHM, *supra* note 48, at 52.

75. FRIEDMAN, *supra* note 1, at 316.

76. KUDLAC, *supra* note 49, at 20.

77. FRIEDMAN, *supra* note 1, at 317.

78. *Furman*, 408 U.S. 238, 290 (Brennan, J., concurring).

unusual;” in other words, capital punishment was unconstitutional because only “a capriciously selected random handful [of criminals]” get sentenced to death.⁷⁹ In the years immediately following the *Furman* decision, attempts to reinstate or uphold state death penalty laws failed.⁸⁰

However, the death penalty would not be permanently put to rest as the *Furman* decision merely suspended its use. Capital punishment was not found unconstitutional per se; rather it was the execution—the discriminatory and arbitrary administration—of the death penalty that violated the Eighth Amendment.⁸¹ Specifically, the majority ruling only found the existing death penalty statutes—and not the death penalty itself—unconstitutional. Thus, states could technically legalize the use of the death penalty if they underwent a process of legislative reform.⁸²

C. *Post-Furman–1990s*

In the years following *Furman*, several states started reforming their statutes to eliminate arbitrary and discriminatory rules that previously guided the process, in order to reinstate the death penalty.

Florida was the first state to pass new death penalty laws, reinstating capital punishment only five months after the *Furman* decision.⁸³ By 1975, thirty states had again passed death penalty laws and nearly 200 people sat on death row.⁸⁴ The Court now had to decide the constitutionality of these new death penalty laws. In July of 1976, four years after *Furman*, the Court handed down its ruling for five test cases involving felony murder, each representing a state that had enacted one of the five types of new

79. *Id.* at 309–10 (Stewart, J., concurring).

80. *See, e.g.*, *Roberts v. Louisiana*, 428 U.S. 325, 336 (1976) (reversing the death sentence imposed by Louisiana law for first-degree murder); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (reversing death penalty sentences imposed by North Carolina law for first-degree murder); *Moore v. Illinois*, 408 U.S. 786, 800 (1972) (reversing a death penalty sentence imposed by Illinois law for first-degree murder).

81. BOHM, *supra* note 48, at 54.

82. *See* Corinna Barrett Lain, *Furman Fundamentals*, 82 WASH. L. REV. 1, 47–48 (2007).

83. BOHM, *supra* note 48, at 54.

84. KUDLAC, *supra* note 49, at 20.

death penalty laws.⁸⁵ In *Woodson v. North Carolina*⁸⁶ and *Roberts v. Louisiana*,⁸⁷ the Court found statutes that imposed the death penalty for all capital crimes unconstitutional, arguing that not all defendants are the same, and therefore, punishing all capital murder defendants with death is as unduly harsh as arbitrarily imposing the punishment.⁸⁸

On the other hand, in *Gregg v. Georgia*, the Court upheld the constitutionality of new state statutes that established guidelines for juries and judges when deciding whether to impose the death penalty.⁸⁹ The *Gregg* decision also spurned some important death penalty reforms including the adoption of strict sentencing guidelines, bifurcated trials, and proportionality review.⁹⁰

In 1977, after states began reinstating capital punishment, the firing squad became the primary method of execution.⁹¹ Shortly thereafter, Oklahoma became the first state to adopt lethal injection, although the first lethal injection execution did not occur until 1982 in Texas.⁹² From the mid-1970s through the 1980s, public approval of the death penalty was on a gradual, steady incline,⁹³ and the number of executions increased as capital punishment regained momentum, once again becoming a significant aspect of the justice system.⁹⁴

85. BOHM, *supra* note 48, at 56.

86. 428 U.S. 280, 305 (1976).

87. 428 U.S. 325, 336 (1976).

88. BOHM, *supra* note 48, at 56. In *Lockett v. Ohio*, the Court emphasized promoting individualized sentences, when it invalidated the death sentence of an African American woman convicted of murder due to her peripheral involvement in a pawn shop robbery. 438 U.S. 586, 603–05 (1978); Craig Haney, *Evolving Standards of Decency: Advancing the Nature and Logic of Capital Mitigation*, 36 HOFSTRA L. REV. 835, 846 n.40 (2008). Instead of limiting its decision to narrow, fact-specific grounds, the Court broadly concluded that the Ohio death penalty statute was invalid and “fundamentally changed the nature of the sentencing decision in capital cases.” WELSH S. WHITE, *THE DEATH PENALTY IN THE NINETIES: AN EXAMINATION OF THE MODERN SYSTEM OF CAPITAL PUNISHMENT* 6–7 (1991).

89. 428 U.S. 153, 206–07 (1976); BOHM, *supra* note 48, at 67.

90. BOHM, *supra* note 48, at 57.

91. *Death Penalty History*, *supra* note 34.

92. *Id.*

93. FRANK R. BAUMGARTNER ET AL., *THE DECLINE OF THE DEATH PENALTY AND THE DISCOVERY OF INNOCENCE* 179 (2008); *Continued Majority Support for Death Penalty*, PEOPLE-PRESS.ORG (Jan. 6, 2012), <http://www.people-press.org/2012/01/06/continued-majority-support-for-death-penalty/>.

94. KUDLAC, *supra* note 49, at 20–21.

While the 1980s represented a popularization of the death penalty in the United States, capital punishment was increasingly unpopular in the international community. Treaties, such as the 1984 United Nations Convention Against Torture⁹⁵ and the 1989 Convention on the Rights of the Child,⁹⁶ encouraged nations to limit or abolish the use of capital punishment. By the turn of the twenty-first century, a significant majority of countries had abolished the death penalty.⁹⁷ This paradox appears particularly stark when acknowledging that the United States is repeatedly one of the world's leaders in annually confirmed executions, finding itself in the same category as countries such as China, Iran, Iraq, Saudi Arabia, North Korea, and Yemen.⁹⁸

Despite international pressure, the United States continues to embrace the use of the death penalty, and the Supreme Court continues to struggle with the proper boundaries for capital punishment within the confines of the Eighth Amendment. For example, in *Penry v. Lynaugh*, *Thompson v. Oklahoma*, and *Ford v. Wainwright*, the Court respectively ruled on the constitutionality of executing the mentally ill, the mentally retarded, and juveniles.⁹⁹ More specifically, the Court ruled that executing the insane is unconstitutional,¹⁰⁰ executing the mentally retarded is constitutional—although retardation would be a mitigating factor during sentencing¹⁰¹—and executing juveniles below sixteen years of age is unconstitutional in states that do not have a set minimum age in their death penalty statutes.¹⁰² In 1989, the Court further ruled in *Stanford v. Kentucky* that it is not unconstitutional for sixteen and seventeen year olds to be sentenced to death.¹⁰³

95. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

96. Convention on the Rights of Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

97. *Abolitionist and Retentionist Countries*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/abolitionist-and-retentionist-countries> (last visited Feb. 27, 2015) (noting that ninety-eight countries have abolished the death penalty for all crimes, seven countries have abolished it for ordinary crimes only, thirty-five are abolitionist in practice, and fifty-eight still retain the death penalty either in law or practice).

98. *Id.*

99. 492 U.S. 302, 340 (1989); 487 U.S. 815, 838 (1988); 477 U.S. 399, 409–10 (1986).

100. *Ford*, 477 U.S. at 409–10.

101. *Penry*, 492 U.S. at 340.

102. *See Thompson*, 487 U.S. at 838.

103. 492 U.S. 361, 380 (1989).

Race also remains a pervasive point of debate. Statistically, states with the “highest concentrations of non-white citizens have used the death penalty most frequently.”¹⁰⁴ In 1987, in *McCleskey v. Kemp*, the Supreme Court held that racial disparities do not per se prove a violation of the Equal Protection Clause, although intentional racial discrimination, if shown, could certainly trigger constitutional protection.¹⁰⁵

As with the historical trend of shifting approval and disapproval of the death penalty, the boundaries set by the Court were revisited in succeeding years.

D. 1990s–Present

In the most recent decades, the Supreme Court has continued to build off its post-*Furman* jurisprudence. In *Atkins v. Virginia*, the Supreme Court held that executing a mentally retarded individual would violate the Eighth Amendment’s prohibition against cruel and unusual punishment.¹⁰⁶ A few years later, in *Roper v. Simmons*, the Supreme Court held that the Eighth Amendment forbids the imposition of the death penalty on juveniles under the age of eighteen.¹⁰⁷ The Supreme Court has gradually and persistently refined the parameters of the Eighth Amendment and whittled down the death penalty’s reach.¹⁰⁸ Despite this, since the reinstatement of the death penalty in 1977 to date, 1402 executions have taken place.¹⁰⁹ Public support for the death penalty also reached an all-time high in the mid-1990s, with 78% of Americans in favor of the death penalty for criminals convicted of murder.¹¹⁰

104. Galliher et al., *Progressive Era*, *supra* note 41, at 541. In fact, of the states that had originally abolished the death penalty during the Progressive Era, only Arizona and Tennessee had populations with “more than five percent minority citizens.” *Id.* at 542.

105. 481 U.S. 279, 291–92, 298 (1987).

106. 536 U.S. 304, 321 (2002).

107. 543 U.S. 551, 578–79 (2005).

108. *See supra* notes 100–07.

109. *Execution by Year Since 1976*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/executions-year> (last visited Feb. 27, 2015).

110. *Continued Majority Support for Death Penalty*, PEW RES. CTR. (Jan. 6, 2012), <http://www.people-press.org/2012/01/06/continued-majority-support-for-death-penalty/>.

Admittedly, since then, support for the death penalty has slowly declined. *Id.* (noting that in October 2011 support for the death penalty fell as low as 58%).

Towards the end of the twentieth century and into the twenty-first, many studies began acknowledging the effect of race on capital punishment cases and death penalty decision-making.¹¹¹ Among them, a 2003 report completed by the American Civil Liberties Union of Virginia provides statistical data on the race of victims and offenders in capital crimes between 1978 and 2001, and analyzes how race has influenced death sentencing.¹¹² For example, the study found that, for black defendants, the race of the victim could affect their punishment.¹¹³ More specifically, in cases of capital rape-murder, for example, while defendants were sentenced to death in 70.8% of all such cases, black defendants convicted of the rape and murder of a white victim were sentenced to death in nearly 100% of the cases, while by comparison, black defendants convicted of the rape and murder of a black victim were sentenced to death in only 28.6% of the cases.¹¹⁴ In general, the study's analysis of the data reveals racial disparities in death sentencing in Virginia that unduly favors white victims and punishes black defendants.¹¹⁵ Studies across other states have shown similar results, highlighting the prevalence of racial disparities in deciding the use of capital punishment.¹¹⁶

In recent times, the 2011 execution of Troy Davis, an African American man who was convicted of killing a police officer, came to prominence for not highlighting the divide over the use of the death penalty and the racial injustices that plague it.¹¹⁷ Despite the doubt surrounding Davis' guilt and the support he received from several prominent officials and organizations, to many, his death symbolized the reality of racial inequalities in the justice system.¹¹⁸

111. See *Race and the Death Penalty*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/race-and-death-penalty> (last visited Feb. 27, 2015) [hereinafter *Race and the Death Penalty*].

112. RACHEL KING ET AL., ACLU, BROKEN JUSTICE: THE DEATH PENALTY IN VIRGINIA 11–12 (2003), available at http://www.aclu.org/files/FilesPDFs/broken_justice.pdf.

113. *Id.* at 14.

114. *Id.*

115. *Id.*

116. *Race and the Death Penalty*, *supra* note 111.

117. Kim Severson, *Davis Is Executed in Georgia*, N.Y. TIMES (Sept. 21, 2011), http://www.nytimes.com/2011/09/22/us/final-pleas-and-vigils-in-troy-davis-execution.html?page-wanted=all&_r=0.

118. See *id.*

As it currently stands, lethal injection is the overwhelmingly predominant method of execution in the United States.¹¹⁹ Since 1976, there have been 1219 executions via lethal injection compared to 158 electrocutions, the next common execution method.¹²⁰ Eight states currently retain electrocution as an authorized method of execution,¹²¹ three states currently retain the gas chamber,¹²² three states currently retain hanging,¹²³ and two states tentatively retain the firing squad in a limited manner,¹²⁴ although each of these states still have lethal injection as the primary execution method.¹²⁵ However, for many states retaining secondary methods of execution, such methods are only retained in case a current method, presumably lethal injection, is found unconstitutional.¹²⁶

CONCLUSION

Notwithstanding the permanence of the death penalty in the American criminal justice system, its legitimacy is once again at a crossroads. Despite the persisting moral undertones that have always colored capital punishment's main criticisms, in recent years there has been increased criticism emphasizing racial disproportionalities,¹²⁷ the evolution of scientific innocence technolo-

119. *Methods of Execution*, DEATH PENALTY INFO. CTR., www.deathpenaltyinfo.org/methods-execution (last visited Feb. 27, 2015) [hereinafter *Methods*].

120. *Id.* (noting also that since 1976 there have been eleven gas chamber executions, three hangings, and another three firing squad executions).

121. *Id.* (listing Alabama, Arkansas, Florida, Kentucky, Oklahoma, South Carolina, Tennessee, and Virginia).

122. *Id.* (noting Arizona, California, Missouri, and Wyoming).

123. *Id.* (listing Delaware, New Hampshire, and Washington).

124. *Id.* (noting Oklahoma and Utah). However, again, Oklahoma only authorizes the firing squad if lethal injection and electrocution are both found unconstitutional. *Id.* Utah, on the other hand, authorizes the firing squad for those death row inmates who elected this method prior to Utah's elimination of the firing squad. *Id.*

125. *Id.*

126. *Id.*; see also Warner v. Gross, 776 F.3d 721 (10th Cir. Jan. 12, 2015), cert. granted *sub nom.* Glossip v. Gross, 83 U.S.L.W. 3625 (U.S. Jan. 23, 2015) (No. 14-7955).

127. Richard C. Dieter, *The Death Penalty in Black and White: Who Lives, Who Dies, Who Decides*, DEATH PENALTY INFO. CTR. (1998), <http://www.deathpenaltyinfo.org/death-penalty-black-and-white-who-lives-who-dies-who-decides> (discussing several "race-of-defendant disparities," including research suggesting that a criminal defendant is nearly four times more likely to receive a death sentence if he is black while also noting that 98% of chief district attorneys in counties that employ capital punishment are white).

gy,¹²⁸ and the exorbitant costs of seeking the death penalty.¹²⁹ Additionally, recent botched lethal injection executions and the difficulty in obtaining lethal injection drugs have called into question the legitimacy of our most common execution method.¹³⁰ The general global trend away from the death penalty, including among America's greatest allies, makes the intrepid nature of capital punishment within the fabric of our society more glaring. Altogether, this makes for the possibility of very drastic changes in the near future as to how we approach, prosecute, and punish those whose conduct exceeds the tolerable bounds of moral depravity.

This resurgence of anti-death penalty sentiment comes at a time when death penalty discourse and coverage have shifted from constitutional and moral issues to the administration of capital punishment—that is, from being victim-centered to focusing on the rights of the criminal defendant.¹³¹ Modern technology has also allowed for the DNA testing of “skin, saliva, semen, blood or hair” to convict or exonerate death row prisoners.¹³² With the increase of actual innocence projects,¹³³ the gradual limitation of

128. See, e.g., *DNA Testing and the Death Penalty*, ACLU (Oct. 3, 2011), <https://www.aclu.org/capital-punishment/dna-testing-and-death-penalty> [hereinafter *DNA Testing*] (noting that seventeen death row inmates were exonerated by DNA testing).

129. Richard C. Dieter, *Millions Misspent: What Politicians Don't Say About the High Costs of the Death Penalty*, DEATH PENALTY INFO. CTR. (1994), <http://www.deathpenaltyinfo.org/node/599>.

130. Notwithstanding lethal injection's dominance as the primary method of execution, the recent botched executions coupled with states' difficulties to obtain death penalty drugs could urge lawmakers and courts to overrule or abolish lethal injection as a permissible means of executing death row inmates. In late 2014, Utah lawmakers announced their desire to reinstate the firing squad as the primary method of carrying out executions if the correct lethal injection drugs are not available. Tom Harvey, *Firing Squad Executions Back on the Table in Utah Legislature*, S.L. TRIB. (Nov. 19, 2014), www.sltrib.com/news/1846892-155/firing-execution-squad-utah-lethal-death. It is entirely foreseeable that a number of states could soon follow suit.

131. Austin Sarat, *The Politics of the Death Penalty*, 7 PERSPS. ON POL. 928, 929 (2009), available at http://www.unc.edu/~fbaum/Reviews/Innocence_Review_POP_Sarat.pdf (last visited Feb. 27, 2015).

132. *DNA Testing*, *supra* note 128. This is of consequence considering that “[e]yewitness misidentification is the single greatest cause of wrongful convictions nationwide, playing a role in more than 75% of convictions overturned through DNA testing.” *Id.*

133. See *Exonerated: Cases by the Numbers*, CNN (Dec. 4, 2013), <http://www.cnn.com/2013/12/04/justice/prisoner-exonerations-facts-innocence-project/> (noting that there have been 311 post-conviction DNA exonerations, and the Innocence Project has been involved in 171 of these exonerations); *Frequently Asked Questions*, INNOCENCE PROJECT, <http://www.innocenceproject.org/faqs> (last visited Feb. 27, 2015) (noting that the Innocence Project currently has nearly 300 active cases, and, since 1989, 325 people in 37 states have

capital punishment by the Supreme Court, the increase in abolition in the international community, and the volatility that has resulted from numerous recent botched executions, a return to *Furman* is not at all far-fetched.

been exonerated through DNA testing post-conviction.