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

Sheherezade C. Malik *
D. Paul Holdsworth **

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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pects. 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. 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.” And while some laws punishable by death, including theft and rebelliousness of children, were generally “bark and no bite,” others, such as murder and rape, unequivocally warranted the death penalty.

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. 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.” 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.”

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.” 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 noose around her neck for an entire year until the executions.

Additionally, there were two reasons why the colonies used the death penalty more sparingly than the British was. One reason was that some colonies, like Massachusetts Bay, had rules that prevented any death sentence “without the testimony [sic] of two or three witnesses.” The plain language of this rule shall . . . be deemed the very import of the words, the framers of the Constitution intended that life could not be taken except after a process of law.

The plain language of the Constitution shall . . . be deemed the very import of the words, the framers of the Constitution intended that life could not be taken except after a process of law.

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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 testimony [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.
10. Id.
11. Id.
12. Id.
13. Id.
14. See generally MELUSKY & MELUSKY, PUNISHMENT: RIGHTS OF RELIGION AND AMERICA.
15. Id. at 29–30.
17. MELUSKY & MELUSKY, PUNISHMENT: RIGHTS OF RELIGION AND AMERICA.
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10. Id.
11. Id.
12. Id.
13. Id.
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. Colonial governments were more ambitious in infusing new ideologies into previously “draconian criminal codes.” Pennsylvania’s constitution, for example, outlined that punishments should be “less sanguinary and in general more proportionate to the crime.” 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.”

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

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. Public hangings both served as deterrents and symbols of municipal or societal power. 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.

Before this shift, individuals awaiting execution were subjected to public humiliation as a means of punishment. In effect, the death penalty replaced the pillory. After the American Revolution, the pillory was abolished and the public hangings became less frequent. New York, initiated in 1795, abolished the death penalty, which was followed in 1796 by Virginia, which abolished the death penalty for “all crimes committed by whites except premeditated murder.”

At the turn of the 19th century, the United States was a nascent republic and enlightened philosophers were advocating for completely abolishing capital punishment. The mid-nineteenth century witnessed a significant increase in public executions in lip-smacking newspapers of the late antebellum era. Much legal subjugation emanated from the courthouse to the public square.}

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28. FRIEDMAN, supra note 1, at 76–77.
29. See id. at 76–77.
30. Id. at 77.
31. See id. at 75–76.
32. Id. at 75. Of course, individuals awaiting execution were subjected to public humiliation as a means of punishment. In effect, the death penalty replaced the pillory. After the American Revolution, the pillory was abolished and the public hangings became less frequent. New York, initiated in 1795, abolished the death penalty, which was followed in 1796 by Virginia, which abolished the death penalty for “all crimes committed by whites except premeditated murder.”
33. Id. at 73–74.
34. Part I: His Crimes and Punishment, www.deathpenaltyinfo.org (2015) [hereinafter Death Penalty], in which nineteenth-century societies were preoccupied with the idea that witchcraft, and their consequences, were responsible for societal hysteresis and periods of mass executions. This movement for the abolition of capital punishment was part of this.
35. FRIEDMAN, supra note 1, at 73–74.
36. See id. at 170–71.
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in which nineteen people were hanged in the summer of 1692 for witchcraft, and another pressed to death by stones, among mass societal hysteria. However, the post-Revolution and Republican periods introduced a calculated shift away from public hangings. This movement was defined by a stark move away from corporal punishment with an emphasis on confinement.

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. The once predominantly public nature of punishment gave way to less theatricality and more priva-
cy. 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."

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. 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. In the late nineteenth century, some states, like New York, initiated a move in bringing the methods of execution "up to date." In 1888, New York introduced the electrical chair in an attempt to abolish the hangman and noose, which was viewed as more barbaric. A select number of states even at-

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/americaneperience/features/general-article/eleanor-progressive/ (last visited Feb. 27, 2015).

39. Id.


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.
Notwithstanding, the vast majority of TWENTY-FIRST
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 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. 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.

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. The notion that crime would accompany poverty and unemployment strengthened society’s view that the death penalty was “a necessary social measure.”

In fact, the 1930s saw more total executions, 1676, than any other decade, and there was no significant opposition to the death penalty. Among them, the hanging of Eva Dugan in 1930, the first woman executed in Arizona, brought about reform in terms of methods of execution. 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. The 1940s experienced only a slight decline in executions, with 1289 total executions.

43. GALLIHER ET AL., STATES LEADING THE WAY, supra note 40, at 79.
44. Death Penalty History, supra note 34.
46. 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”).
47. Id. at 575.
48. BOHM, supra note 48, at 12.
By 1950, the electric chair had become a prevalent method of execution in twenty-six states. Still by 1955, eleven states had introduced death by asphyxiation—pumping poisonous gas into gas chambers—as a more humane way of execution. 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." Indeed, domestic discourse on the death penalty began to mirror international discussions focusing on the suffering of prisoners on death row. 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. 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. By the middle of the twentieth century, only a handful of states maintained the practice of sentencing prisoners to the gallows to die.

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
revalent method of execution, eleven states had poisonous gas into use. With new methods of execution on the rise, an in-math by hanging as the primary method of execution, executions; special equipment, only sentencing prisoners to death by hanging as the primary method of execution, only sentencing prisoners to death. Jon was the first individually tried to poison Jon's chamber. In the hanging of white hood used to wrap the prisoner's head, prompting uncontrollable gush of blood, New York, West Virginia, Vermont, and New Mexico abolished the death penalty. 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.

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.

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. This ruling rattled the once stable notion that the death penalty did not constitute cruel and unusual punishment. 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. In Trop v.

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 49-44.
66. 402 U.S. 183, 205 (1971); BOHM, supra note 48, at 50.
68. See Corinna Barrett Lain, Deciding Death, 57 Duke L.J. 1, 8-9 (2007).
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.\textsuperscript{70} In the decision, the Court referenced the 1910 decision in \textit{Weems v. United States}, in which it found that a punishment of twelve years of hard labor for falsifying documents was cruel and excessive.\textsuperscript{71} The \textit{Trop} court stated, in the context of \textit{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.”\textsuperscript{72}

Despite McGautha’s refusal to find the death penalty arbitrary and capricious, the defense in \textit{Furman} argued unconstitutionality on the grounds of both the Eighth and Fourteenth Amendments, and succeeded in suspending capital punishment across the country.\textsuperscript{73} The \textit{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.\textsuperscript{74} In one fell swoop, \textit{Furman} abolished every death penalty statute across the country and “spared the lives of every man and woman on death row.”\textsuperscript{75} Six hundred inmates across thirty-two states had their death sentences commuted to life imprisonment.\textsuperscript{76}

The abolition of the death penalty in \textit{Furman} was by no means an easy and uniform decision for the Justices on the Court. All nine Justices wrote a separate opinion.\textsuperscript{77} For Justice Brennan, the death penalty was “cruel and unusual” in all situations as “a denial of the executed person’s humanity.”\textsuperscript{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 unusual,” in other words, “proportionate because of the nature of the criminals]” get struck by lightning. Following the \textit{Furman} decision, death penalty laws were revised.

However, the question still rested as the \textit{Furman} decision did not address the execution—the laws and statutes of the death penalty. Specifically, the majority of states retained their death penalty statutes—and more. Thus, states could “spare the lives” of inmates if they underwrote their own statutes.

C. \textit{Post-Furman} Death Penalty

In the years following the \textit{Furman} decision, states started reinstating capital punishment statutes.\textsuperscript{83} By 1976, thirty-three states had to decide their own death penalty laws. In July of 1972, Florida was the first state to instate a death penalty statute.\textsuperscript{84} Following the \textit{Furman} decision, state legislatures enacted death penalty laws and nearly all did. Only one state, New Mexico, had to decide the issue. New Mexico’s legislature enacted death penalty laws. In July of 1972, New Mexico Governor Henry Bussee signed into law a death penalty statute, representing a ruling for the state.

\textsuperscript{70} 356 U.S. 86, 101 (1958).
\textsuperscript{71} Id. at 100–01 (citing 217 U.S. 349, 382 (1910)).
\textsuperscript{72} Id. at 100–01.
\textsuperscript{73} Furman v. Georgia, 408 U.S. 238, 239–40 (1972) (per curiam).
\textsuperscript{74} Id.; BOHM, supra note 48, at 52.
\textsuperscript{75} FRIEDMAN, supra note 1, at 316.
\textsuperscript{76} KUDLAC, supra note 49, at 20.
\textsuperscript{77} FRIEDMAN, supra note 1, at 317.
\textsuperscript{78} Furman, 408 U.S. 238, 290 (Brennan, J., concurring).
\textsuperscript{79} Id. at 309–10 (Stewart, J., concurring).
\textsuperscript{80} See, e.g., Robert: O’Keefe, 421 U.S. 280, 305 (1976) (reaffirming the death penalty sentence imposed by Louisiana for first-degree murder).
\textsuperscript{81} BOHM, supra note 48, at 52.
\textsuperscript{83} BOHM, supra note 48, at 52.
\textsuperscript{84} KUDLAC, supra note 49, at 20.
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usual;” in other words, capital punishment was unconstitu­
tional because only “a capriciously selected random handful [of criminals]” get sentenced to death. In the years immediately fol­
lowing the Furman decision, attempts to reinstate or uphold state
death penalty laws failed.

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. Specif­
ically, 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 pen­
alty if they underwent a process of legislative reform.

**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, re­
instating capital punishment only five months after the Furman
decision. By 1975, thirty states had again passed death penalty
laws and nearly 200 people sat on death row. 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

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79. Id. at 309–10 (Stewart, J., concurring).
81. BOHM, supra note 48, at 54.
83. BOHM, supra note 48, at 54.
84. KUDLAC, supra note 49, at 20.
death penalty laws. In Woodson v. North Carolina and Roberts v. Louisiana, 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. 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. The Gregg decision also spurned some important death penalty reforms including the adoption of strict sentencing guidelines, bifurcated trials, and proportionality review.

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

85. BOHM, supra note 48, at 56.
86. 428 U.S. 280, 305 (1976).
90. BOHM, supra note 48, at 57.
91. Death Penalty History, supra note 34.
92. Id.
94. KUDLAC, supra note 49, at 20–21.

While the 1960s and 1970s witnessed a significant rise in the popularity of capital punishment, the 1980s and 1990s saw a decline in its use. In 1984, the United Nations Convention on the Limitation or Abolition of the Death Penalty was adopted, with the goal of phasing out the practice by the year 2020. Despite international pressure to limit or abolish the death penalty, however, the trend in most countries has been towards its increased use. Public approval of capital punishment has risen steadily in the United States, and the number of executions has increased as well.

98. Id.
102. See Thompson, 403 U.S. at 543.
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 Torture and the 1989 Convention on the Rights of the Child, 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. 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.

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. More specifically, the Court ruled that executing the insane is unconstitutional, executing the mentally retarded is constitutional—although retardation would be a mitigating factor during sentencing—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. 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.

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95. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.
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.
102. See Thompson, 487 U.S. at 838.
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. Gallibert 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.
108. See supra notes 100–07.

Towards the end of the twentieth century, many studies and analyses of capital punishment have been performed. Among them, a 2003 Working Paper by Rachel King of The Poverty Union of Victoria analyzes how capital punishment affects victims and offenders. The study’s analysis of sentencing in Virginia and elsewhere findings that black defendants sentenced to death in nearly 10% of death penalty executions in Virginia since 1976 was black defendants sentenced to death in nearly 10% of death penalty executions in Virginia since 1976 was black defendants sentenced to death in nearly 10% of death penalty executions in Virginia since 1976 was black defendants sentenced to death in nearly 10% of death penalty executions in Virginia since 1976 was black defendants sentenced to death in nearly 10% of death penalty executions in Virginia since 1976 was black defendants sentenced to death in nearly 10% of death penalty executions in Virginia since 1976 was black defendants sentenced to death in nearly 10% of death penalty executions in Virginia since 1976 was black defendants sentenced to death in nearly 10% of death penalty executions in Virginia since 1976 was black defendants sentenced to death in nearly 10% of death penalty executions in Virginia since 1976 was black defendants sentenced to death in nearly 10% of death penalty executions in Virginia since 1976 was black defendants sentenced to death in nearly 10% of death penalty executions in Virginia since 1976 was black defendants sentenced to death in nearly 10% of death penalty executions in Virginia since 1976 was black defendants sentenced to death in nearly 10% of death penalty executions in Virginia since 1976 was black defendants sentenced to death in nearly 10% of death penalty executions in Virginia since 1976 was black defendants sentenced to death in nearly 10% of death penalty executions in Virginia since 1976 was black defendants sentenced to death in nearly 10% of death penalty executions in Virginia since 1976 was black defendants sentenced to death in nearly 10% of death penalty executions in Virginia since 1976 was black defendants sentenced to death in nearly 10% of death penalty executions in Virginia since 1976 was black defendants sentenced to death in nearly 10% of death penalty executions in Virginia since 1976 was black defendants sentenced to death in nearly 10% of death penalty executions in Virginia since 1976 was black defendants sentenced to death in nearly 10% of death penalty executions in Virginia since 1976 was black defendants sentenced to death in nearly 10% of death penalty executions in Virginia since 1976 was black defendants sentenced to death in nearly 10% of death penalty executions in Virginia since 1976 was black defendants sentenced to death in nearly 10% of death penalty executions in Virginia since 1976 was black defendants sentenced to death in nearly 10% of death penalty executions in Virginia since 1976 was black defendants sentenced to death in nearly 10% of death penalty executions in Virginia since 1976 was black defendants sentenced to death in nearly 10% of death penalty executions in Virginia since 1976 was black defendants sentenced to death in nearly 10% of death penalty executions in Virginia since 1976 was black defendants sentenced to death in nearly 10% of death penalty executions in Virginia since 1976 was black defendants sentenced to death in nearly 10% of death penalty executions in Virginia since 1976 was black defendants sentenced to death in nearly 10% of death penalty executions in Virginia since 1976 was black defendants sentenced to death in nearly 10% of death penalty executions in Virginia since 1976 was black defendants sentenced to death in nearly 10% of death penalty executions in Virginia since 1976 was black defendants sentenced to death in nearly 10% of death penalty executions in Virginia since 1976 was black defendants sentenced to death in nearly 10% of death penalty executions in Virginia since 1976 was black defendants sentenced to death in nearly 10% of death penalty executions in Virginia since 1976 was black defendants sentenced to death in nearly 10% of death penalty executions in Virginia since 1976. 111

113. Id. at 14.
114. Id.
115. Id.
117. Kim Severson, Id. wanted=all&_r=0.
118. See id.
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. 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. For example, the study found that, for black defendants, the race of the victim could affect their punishment. 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. 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.

Studies across other states have shown similar results, highlighting the prevalence of racial disparities in deciding the use of capital punishment.

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. 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.
As it currently stands, lethal injection is the overwhelmingly predominant method of execution in the United States. Since 1976, there have been 1219 executions via lethal injection compared to 158 electrocutions, the next common execution method.

Eight states currently retain electrocution as an authorized method of execution, three states currently retain the gas chamber, three states currently retain hanging, and two states tentatively retain the firing squad in a limited manner, although each of these states still have lethal injection as the primary execution method. 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.

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, the evolution of scientific innocence technolo-

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.
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).
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gy, and the exorbitant costs of seeking the death penalty. 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. 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. Modern technology has also allowed for the DNA testing of "skin, saliva, semen, blood or hair" to convict or exonerate death row prisoners. With the increase of actual innocence projects, the gradual limitation of


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.


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-exoneration-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, 326 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.

In *Baze v. Rees*, the constitutional validity of the method of lethal punishment.\(^1\) The method consisted of three chemicals: an intravenous dose of thiopental, followed by potassium chloride.\(^5\) The death special language to violate the Eighth Amendment. The method was modified.\(^5\) Thomas Bowling,\(^8\)

The findings of the court that the method was the lethal injection.\(^5\) For each case, the lethal injection was...