The Societal Impact of Capital Punishment and Its Future Role in Modern Day America

Laurel Lee

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THE SOCIETAL IMPACT OF CAPITAL PUNISHMENT AND ITS FUTURE ROLE IN MODERN DAY AMERICA

By Laurel Lee

A thesis submitted to the faculty of the University of Mississippi in partial fulfillment of the Sally McDonnell Barksdale Honors College

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DEDICATION

This thesis is dedicated to my parents, William and Lisa Lee. Your unwavering love and support have provided me with the opportunities throughout my life that have led me to this moment. I will forever be grateful for the sacrifices you both have made in your lives in order to better my own. I am also thankful for my sister, Hannah Lee. I would not be here without you all. I love you.

This thesis is also dedicated to all the individuals who have been victimized by the discriminatory criminal justice system in America. To the innocent lives who have been wrongfully executed or remain on death row due to a flawed capital punishment system, your suffering and injustices are not ignored. We hear you.
ACKNOWLEDGEMENTS

I would like to acknowledge my advisor, Dr. Miles T. Armaly, for his passion and dedication to my academic growth and success while at Ole Miss. As a mentor for this thesis, Dr. Armaly never wavered in supporting and believing in me throughout this process. The many worries and doubts I had that are standard for projects of this magnitude were reassured time and time again. This thesis could not have been possible without Dr. Armaly.
ABSTRACT

The Societal Impact of Capital Punishment and Its Future Role in Modern Day America

(Written by Laurel Lee under the guidance of Dr. Miles Armaly)

Capital punishment has been a well-established, although extremely controversial, practice throughout American history. It has been the subject of much criticism and debate both nationally and globally, dating back to ancient times. This study intends to research the historical, legal, and social changes of capital punishment in the United States that have occurred since the dawn of the practice in order to detect any trends, and if so, whether these trends allow a realistic prediction of the future of capital punishment. The chronology of capital punishment is first examined in this study in order to indicate that the controversy surrounding the subject is not a recent matter. The trend of increasing restrictions on capital punishment from the Supreme Court is then analyzed in order to establish the probability of its bleak future. This study then demonstrates that evolving standards of decency have contributed to a shift in the language surrounding the capital punishment debate. Concerns over capital punishment’s ethicality, efficiency, disproportionate sentencing, and procedural issues have altered the public’s opinion and diminished support. As the public continues to become more aware of the flaws surrounding capital punishment, the debates continue to intensify, and the Supreme Court continues to restrict its eligibility and administration, this study reveals that the United States is shifting toward the direction of abolishing capital punishment in the future.
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Introduction

Since the establishment of the world’s earliest civilizations, capital punishment, also known as the death penalty, has served as a method of crime deterrence. Capital punishment is defined as the “execution of an offender sentenced to death after conviction by a court of law of criminal offense” (Hood, 2021). Historical evidence reveals that all tribes, from the most primitive to the most advanced, inflicted punishments for chastising lawbreakers, including executions, to atone for their crimes. The act of murder is the crime that most often justifies this extreme form of punishment.

Over 14,000 people in the United States have been executed by the nation’s legal system dating back to colonial times. Beginning in the 1930s, approximately 150 people were executed every year, but the practice of capital punishment dwindled by 1967 due to public condemnation and legal obstacles. There was extreme pressure from critics of the death penalty, and legal authorities in the United States began to question whether the death penalty constituted “cruel and unusual punishment” under the Eighth Amendment of the United States Constitution. As the Supreme Court battled with this problem, there was a voluntary moratorium on executions between 1967 to 197. In 1972, the Supreme Court struck down all death penalty laws in *Furman v. Georgia*, stating these laws were “arbitrary and capricious.” It held that they were indeed “cruel and unusual punishment” under the Eighth Amendment and also violated the due process clause of the Fourteenth Amendment.
Despite this ruling, the Supreme Court reinstated the death penalty in 1976, just four years later in *Gregg v. Georgia*. Currently, 27 states in America continue to permit the practice. An overwhelming amount of executions have occurred in ten southern states, and Texas is responsible for over 35% of executions. Today, around 3,350 people are on death row.

Despite the continual administration of capital punishment in the United States, the practice has declined substantially within the last 15 years. Examining capital punishment on a local level, in 2014 death sentences both decreased and became clustered in a small group of counties. Stephen Breyer indicated in his dissenting opinion in *Glossip v. Gross* that “just 29 counties (fewer than 1% of counties in the country) accounted for approximately half of all death sentences imposed nationwide” from 2004 to 2006 (Garrett et al., 2017). The downturn has become even more prominent following this two year time period. In 2015, the death penalty was sentenced to 51 defendants in 38 counties, and in 2016, it was sentenced to just 31 defendants in 28 counties. To compare, more than 300 defendants received the death penalty in 200 counties every year during the mid-1990s.

There has been a lengthy succession of Supreme Court cases targeting the legality and morality of capital punishment in the United States following the *Gregg v. Georgia* decision. In 1976, the Court ruled in *Woodson v. North Carolina* that mandatory death sentences violated the Eighth and Fourteenth Amendments. In 1977, the Court held
in *Coker v. Georgia* that the death penalty could not be imposed for the crime of rape. In *Lockett v. Ohio*, one year after *Coker*, the Court ruled that mitigating evidence, not just the circumstances of the crime, must be considered by sentencing authorities when deciding whether to sentence a defendant to death. In 1982, the Court prohibited the execution of those who had no intention of murder in *Enmund v. Florida*, and in 1986, it prohibited executing the insane in *Ford v. Wainwright*. Two years later, the Court ruled in *Thompson v. Oklahoma* that executing an individual who was under the age of 16 when the crime occurred violated the Eighth Amendment. In 2002, the Supreme Court ruled against the execution of intellectually disabled offenders in *Atkins v. Virginia*, and in 2003 it ruled that for capital cases, defense counsel must conduct mitigation investigations in *Wiggins v. Smith*. The 2005 *Roper v. Simmons* ruling prohibited the execution of defendants who were under 18 when the crime occurred. In 2008, the Court ruled in *Kennedy v. Louisiana* that executing those convicted of child rape where the victim did not die and death was not the intention violated the Eighth Amendment.

Standards of decency have evolved and contributed to altered language surrounding capital punishment debates. The language in today’s capital punishment debate differs from the language in debates that occurred 50 years ago, 20 years ago, and even 10 years ago. In 1958, the Supreme Court endorsed in *Trop v. Dulles* that punishments regarded as “cruel and unusual” should shift over time, complying with society’s “evolving sense of decency” (*Trop v. Dulles*, 1958). Public opinion has evolved,
demonstrating a change in societal morals and values. Those in opposition to the practice argue that it is unjustified and inhumane and hold that no one’s life should be ended, no matter what crime has been committed. Because a number of defendants on death row have been proven to be innocent from DNA testing, the contention that no one should be executed in order to refrain from executing an innocent person has increased.

Justifications argued by those in support of the practice are dwindling. Throughout time, supporters argued that capital punishment served a purpose because of how practical the practice was. There were no secure prisons that were safe enough to hold violent offenders for extended periods of time for most of our nation’s history (Steiker, 2010). Only brief stays were adequate in county and town jails, with similar conditions in state prisons. For offenders who could not be released, it appeared that there were hardly any other opinions to execution. However, this dilemma has changed throughout the course of time. Because of advances in technology and staffing, there are now supermax facilities where offenders with life-without-parole sentences can serve. This viable alternative to the death penalty has resulted in altered public opinion, as many people are now aware that solitary confinement is a horrible punishment. There are some individuals who contend that remaining isolated in a cell indefinitely is worse than being executed. The threat of perpetual confinement provides a deterrent that matches the deterrent of capital punishment.
Capital punishment served as a commanding tool of white supremacy throughout history. However, in today’s society, this no longer serves to be a valid reason as to why capital punishment is necessary in the United States. The death penalty was administered in order to suppress the likelihood of slave uprisings. From 1608 to 1972, nearly 15,000 executions were documented (Espy & Smykla). The racial discrepancy is evident, as there were considerably more Africans executed than whites. For crimes that had African American victims, even those of murder, whites were rarely executed. Contrarily, African Americans were often executed for committing crimes of sexual assault.

The diminishing justifications for supporting capital punishment have been accompanied by the growing justifications for opposing the practice. The argument by opponents that could possibly be the most impactful toward capital punishment concerns the high cost of the practice. This argument calls attention to the discrepancies of cost found among capital punishment and other punishments: capital punishment is extremely more costly to administer compared to the alternate form of punishment that is long-term or lifetime imprisonment. Some explanations as to why the cost of capital punishment is so high concern the longer appeals and trials needed when a defendant’s life hangs in the balance, as well as the additional attorneys and experts needed on both sides of the case. There is also the growing argument surrounding innocent individuals being sentenced and eventually executed, but additional evidence being subsequently discovered that
proves their innocence. An April 2014 study conducted by Proceedings of the National Academy of Sciences revealed that at least four percent of individuals sentenced to death are likely innocent (Gross et al., 2014). The longstanding pro-death penalty position of capital punishment serving as a deterrent has also continued to be contested by economists, statisticians, and opponents of the death penalty.

Controversy surrounding capital punishment continues to rise both nationally and globally. As each day passes, the debates continue to escalate. Numerous states in the United States now oppose the death penalty. Despite 24 states permitting the practice, 23 have abolished it and three currently have a governor-imposed moratorium it. Numerous countries have also outlawed the practice entirely: 142 countries have abolished capital punishment either in practice or in law, an increase from the 106 countries that did so in 2017. The inefficient, inconsistent, and lengthy process of capital punishment currently in America has garnered attention to the debate. Numerous studies have all revealed the immense savings that could result from abolishing the death penalty. The mounting pressure to eliminate wasteful spending will possibly result in a greater number of law enforcement officials and legislators examining this harsh reality.

Awareness by the public to the highly politicized character of the capital punishment process has also risen in the recent years. Research has continued to find that the major factors that impact the outcomes in capital punishment sentences are race, social class, and the quality of legal counsel. African Americans convicted of crimes
against caucasians and receive inadequate legal counsel face the greatest likelihood of being sentenced to death. The poorest defendants are hindered in their ability to afford legal counsel of the highest quality, thus impacting the ability to receive the most favorable sentencing. The geographic location has also been discovered to impact whether a defendant is sentenced to death, as studies have demonstrated that defendants in the more conservative regions of the United States often have a lower-cost defense. These regions are also greater advocates for the death penalty, resulting in more offenders being sentenced to death in the south compared to other regions.

The additional restrictions that the Supreme Court continues to place on capital punishment and the evolving language surrounding the debate present an intriguing question for the future of capital punishment in America: Is the United States on the path to abolishing capital punishment? This study intends to research the historical, legal, and social changes of capital punishment in the United States that have occurred following the inception of the practice. The research intends to examine the history of capital punishment dating back to its origins and also the numerous Supreme Court decisions and opinions of justices regarding the legality of the practice. This study also seeks to analyze the various factors that have contributed to the shift in the moral standards held by Americans following the reinstatement of capital punishment. An analysis of the rationale behind other countries’ abolishment of capital punishment must also be studied.
By examining the history of capital punishment in the United States and the numerous Supreme Court rulings on this issue, this study attempts to identify whether this trend toward greater restriction on capital punishment indicates the future abolition of the practice. Also, by examining the history and shift in the public opinion of the death penalty since its emergence, this will assist in predicting more efficiently how the public’s opinion in the future will influence the legality of the practice. Through analyzing the legality of capital punishment globally, this will determine how international legality of the practice has in turn influenced the continuing national legality in the United States. This study contributes to the research of capital punishment in the United States because it ties together several of the possible historical, legal, and social changes of capital punishment and the various factors that sparked these changes in order to accurately and realistically predict what the future of the practice may entail for the practice.

Societal change suggests that the United States is shifting toward the direction of abolishing capital punishment in the inevitable future. This research indicates that the greater legal limitations placed on capital punishment by the Supreme Court since 1976 allude to its inevitable abolishment in a forthcoming Supreme Court decision. The shift in moral standards by Americans following the reinstatement of capital punishment is identified in this research as the pivotal factor prompting greater legal limitations placed on the practice by the Court. The altered public opinion in turn has resulted in altered
political decisions of capital punishment. The American people are now cognizant of the overt politicized character of the capital punishment process in America; this unconstitutionality is now clearly identified. It would be difficult to argue that the innumerable factors and changes surrounding capital punishment have not lessened the probability of the practice’s future in the United States.
Chapter I: The History of Capital Punishment

The lengthy history of capital punishment dates back to a few thousand years, stretching back as early as 18th century B.C. The laws surrounding the death penalty are located in the Code of King Hammurabi of Babylon; stone tablets inscribed the Hammurabi Code for the public to view, and this allocated the death penalty for over 20 various crimes. Contingent on a person’s social status, crimes such as perjury or theft that are punished much more mildly in today’s society could constitute the death sentence. The Code notoriously issued that “If a man destroys the eye of another man, they shall destroy his eye” (Harper, 2015). The first historically documented death sentence took place in Egypt during 16th century B.C., after the offender was accused of magic and sentenced to end his own life.

Several centuries later, the death penalty was included in the Hittite Code in 14th century B.C., although sparingly. Enslavement was the punishment for the most extreme crimes, however death was frequently punished for sexual crimes. In 7th century B.C., the Draconian Code of Athens ruled that death was the only punishment for all crimes. There has been a tale of the Draconian Code being written in blood instead of ink, however this may be an apocryphal tale.

In 5th century B.C., the Roman Law of the Twelve Tables also included the death penalty. The death penalty varied according to whether the individual was a nobility, freeman, or slave. Punishments eligible for the death sentence included insulting songs,
publicizing libels, burning a house or stack of corn near a house, eating or cutting a farmer’s crops, perjury, disturbing the city during the night, intentional murder of a parent or freeman, or stealing if one was a slave. There were numerous methods of executions administered: burning, drowning, beheading, burying alive, boiling in oil, crucifixion, hanging, disembowelment, flaying alive, stoning, being thrown to wild animals, quartering, impalement, and strangling (Reggio, 2014). For the crime of murdering a parent, the offender was plunged into water in a sack that contained a viper, dog, ape, and rooster. Around 399 B.C. the most infamous death execution in B.C. occurred when Socrates was forced to drink poison for perverting the youth and heresy.

The Law of Moses arranged numerous capital crimes into a systematic code. There is documentation that the Jews administered numerous death penalty methods such as hanging, crucifixion, stoning, throwing the offender from a rock, and beheading. In 29 A.D. the most notorious execution throughout history transpired when Jesus Christ was crucified outside Jerusalem. Crucifixion and other barbaric death penalty methods in the Roman Empire were abolished by the Emperor Constantine 300 years after this (Randa, 1997). The Code of Theodosius established over 80 crimes that were eligible for death in the year 438.

There has been a lengthy history of the death penalty in Britain that impacted the American colonies more so than any other country. Around 450 B.C. the method of execution was frequently administered by throwing the offender into a quagmire. In the
10th century hanging became the standard method of execution, and a century later, William the Conqueror outlawed the death penalty entirely, excluding times of war. Despite this ruling, it was short lived — he allowed executions by means of gallows and drowning pits. In 1279, 289 Jews were hanged because they engaged in the practice of cutting small pieces from coins. When Edward I was ruler, two gatekeepers were executed because they had not closed the city gate early enough to stop an accused murderer from fleeing. For the crime of treason, women were burned and men were drawn, hanged, and quartered. Individuals in the upper class were often beheaded, and someone could be burned because he or she married a Jew. For individuals who refused to confess their crimes, pressing was the method administered. Heavy weights were continually placed on the offender’s chest until he or she confessed or was killed (Randa, 1997).

Throughout the 16th century reign of Henry VIII, around 72,000 people were executed, often by hanging, boiling, beheading, burning at the stake, or quartering and drawing. There is documentation that reveals that some individuals boiled for as long as two hours prior to their eventual death. Numerous capital crimes such as not confessing to a crime and treason were eligible to receive the death sentence. In the two centuries that followed the 16th century, more than 200 crimes were eligible for the death sentence by the 1700s. Crimes such as robbing a rabbit warren, theft, and cutting down a tree, counterfeiting tax stamps, and robbing a house or shop were just a few of these crimes.
From 1823 to 1837, reforms emerged and capital punishment was removed for more than half of the crimes that were formerly eligible for the death sentence (Reggio, 2014). In the 19th and 20th centuries, death punishments were increasingly abolished not only in Britain but throughout Europe as well.

A. History in the United States

Examining the history of the death penalty in the United States, death penalty laws were first established during colonial times. The first documented execution occurred during the early 17th century in the Jamestown colony in present-day Virginia, when Captain George Kendall was executed because he was reportedly a spy for the Spanish. Four years after this first execution in America, the governor of Virginia, Sir Thomas Dale, instituted the *Divine, Moral and Martial Laws*. This code ruled that death would be punished for even minor crimes, such as killing someone’s chickens or pinching grapes. Other crimes that were punishable by death included trading with Native Americans or hitting one’s parents (Marcus, 2007).

The state of Virginia set a standard in which other colonies soon followed. There were some colonies that were extremely stern in their administration of the death sentence, whereas other states were the opposite. The first execution in the Massachusetts Bay Colony occurred in 1630, however the first capital statutes did not arise until after this. Between 1636 to 1647 the Capital Laws of New England outlawed the death penalty
for crimes of pre-meditated murder, adultery, sodomy, idolatry, witchcraft, rape, blasphemy, manstealing, assault in anger, statutory rape, manslaughter, perjury in a capital trial, poisoning, rebellion, and bestiality (Randa, 1997). The Commonwealth of Massachusetts identified just seven capital crimes eligible for death by 1780: murder, arson, sodomy, buggery, rape, burglary, and treason.

In 1665, New York established Duke’s Laws, which indicated that capital punishment could be administered for the rejection of God’s existence, pre-meditated murder, killing by lying in wait or by poisoning, killing someone who did not have a defensive weapon, buggery, perjury in a capital trial, sodomy, kidnapping, treacherously denying the king’s rights or physically resisting his authority, conspiracy to seize forts or towns in the colony, and hitting one’s parents.

Nearing the end of the colonial period, Founding era thinkers, such as James Madison and Benjamin Franklin, provided the first criticism of capital punishment in America, arguing for regulation and abolition in the young country (Steiker, 2010). Madison, Franklin, and others who found fault with the death penalty implemented many ideals from Cesare Beccaria’s 1764 essay *Of Crimes and Punishments*, which was tremendously influential and argued for capital punishment to be completely abolished (Steiker, 2010). He held that the punishment was “a war of a whole nation against a citizen, whose destruction they consider as necessary, or useful to the general good” (Beccaria & Voltaire, 1767). He also expressed that there was only one occasion
for which death was necessary — when the individual’s death could guarantee the safety
of a nation. The death penalty throughout history had not stopped insistent individuals
from harming society, and death was merely a “momentary spectacle, and therefore a less
efficacious method of deterring others, than the continued example of a man deprived of
his liberty” (Beccaria & Voltaire, 1767). The essay was comprised of political theory
arguments that stated that people did not own the right to commit suicide and therefore
the state could not be delegated that power. His essay also asserted instrumental claims
that the danger of “perpetual slavery” was an adequate impediment to crime and the
benefits claimed of public persecutions were diminished due to their “barbarity.” The
arguments in Becarria’s essay paved the argument surrounding capital punishment near
the end of the eighteenth century and the early nineteenth century.

The first death penalty reforms in America did not occur until the establishment of
the Declaration of Independence in 1776. Thomas Jefferson and four other individuals
were commissioned to amend Virginia’s laws. They were inspired by Beccaria’s On
Crimes and Punishment when rewriting Virginia’s laws. They advised that the only
crimes that should be eligible for the death penalty are murder and treason. This
recommended legislature prevailed over the bill by just one vote.

James Madison, Benjamin Franklin, and Thomas Jefferson are some of the most
esteemed and respected figures throughout American history. It is significant that
Madison and Franklin criticized the American criminal justice system and Jefferson
restricted the eligibility of the death penalty over three centuries ago. Our nation’s founding fathers paved the way for the mounting opposition of capital punishment that consumes America today. It is quite astonishing that capital punishment has been contested since this nation gained independence.

During the late 1700s, organizations that pushed for the abolition of the death penalty and improvement of prison conditions started to emerge in various colonies. In 1794, Pennsylvania outlawed the death penalty for all crimes except first degree murder. In 1796, New York permitted construction of the first penitentiary in the state, outlawed whipping, and limited the amount of capital offenses to two rather than thirteen. Similar reform bills were passed in Kentucky and Virginia, and Vermont, Maryland, New Hampshire, and Ohio limited their capital crimes (Marcus, 2007). Each of these states also constructed state penitentiaries. Contrarily, several states engaged in the complete opposite manner. Rhode Island, New Jersey, Massachusetts, and Connecticut increased death eligible crimes. Numerous southern states also established more crimes to be capital, particularly for slaves. It is evident that the abolition of the death penalty was never a linear trend. Rather, as some states limited or abolished the death penalty, other states enthusiastically took measures to preserve the practice.

The creation of state penitentiaries is extremely important in the capital punishment debate. Prior to this emergence, those in support of capital punishment argued that there was no alternative to the death penalty, because there were no large
enough institutions that could house a significant number of violent and dangerous offenders. However, after state penitentiaries were created, this could no longer be a valid argument offered in support of capital punishment. Other punishments such as life in prison without parole were feasible alternatives, weakening the necessity of capital punishment. The argument in support of capital punishment has not just weakened in recent years, but over several decades. For more than two centuries, the argument for capital punishment has been exposed and has lost credibility. With each passing decade, it becomes more clear that there is no longer a place for capital punishment in the American criminal justice system.

Throughout America’s history, the early decades in the twentieth century had the greatest number of capital punishment cases being repealed but later reinstated. Between 1897 to 1917, capital punishment was abolished in ten states. However, by the end of the 1930s, eight of the states had reinstated capital punishment, with some reinstating it within just a few years following the abolishment. Geographically, all of these states were in the Midwest or West except Tennessee, instead of the deep south which had the greatest amount of lynchings. Regarding the four states where capital punishment was abolished for the shortest time period, lynchings were “the most important common triggering even in the reinstatement of the death penalty” that followed this abolishment.

Between 1833 to 1853, the earliest significant reform occurred during this era. Public executions were criticized as cruel, and a number of states established laws for
hangings to be private. In 1846, Michigan ultimately became the first state to abolish the death penalty for all crimes excluding treason. In 1852, Rhode Island also abolished the death penalty and Massachusetts restricted the death penalty to be eligible for only first-degree murder. A year later, Wisconsin abolished the death sentence in response to a horrid execution that occurred in which the offender grappled for five minutes at the end of the rope, his heart not stopping until 18 minutes had passed. Throughout the second half of the 19th century, states started to pass laws that prohibited mandatory death sentences.

By 1895, in 18 states legislators transitioned to discretionary capital punishment instead of mandatory in an attempt to increase the number of convictions and executions for murderers. There were however a handful of victories for the abolitionists during this time. Between 1876 to 1887, Maine outlawed the death penalty, reinstated it, and then outlawed it again. For six years, Iowa also abolished the punishment. Additionally, in 1872 Kansas passed a “Maine Law” that acted as de facto abolition.

From 1895 to 1917, a second great reform occurred in this era. The number of federal death crimes were limited by the United States Congress in 1897, and in 1907, Kansas prohibited all death penalties. Eight additional states outlawed the death penalty between 1911 to 1917: Oregon, North Dakota, South Dakota, Minnesota, Arizona, Tennessee, and Missouri. Despite this resurgence of the abolition movement, it once again tempered between 1917 to 1955. In 1919 and 1920, Arizona, Washington, and
Oregon reestablished the practice. Concerns surfaced due to a failure of the less “civilized” methods of execution, as demonstrated by the 1930 execution of Eva Dugan in Arizona. She was the first female in the state of Arizona that was executed, and during her botched execution the hangman miscalculated the drop and her head completely lacerated from her body. New methods of execution, the electric chair and gas chamber, were instituted by additional states. Throughout this period, many impassioned protests against certain convicted offenders’ executions occurred, however resistance against the death punishment itself was minimal.

The majority of states upheld the death penalty until the 1950s, during which there was a steep reduction of public support for the practice between 1955 to 1972 (History of Death Penalty Laws, 2019). Extensive studies conducted in Canada and England that immensely criticized the death penalty were then circulated all throughout the United States. In novels and film, offenders on death row delivered their own personal emotional accounts of the death penalty. In 1957, Alaska and Hawaii abolished the death penalty, followed by Delaware the next year. Politicians were pressured to take a position on capital punishment as the debate over the issue consumed the United States. In 1961 the death penalty was reinstated in Delaware, in 1963 it was outlawed for treason in Michigan, and in 1964 it was abolished in Oregon. The following year, New York, Vermont, Iowa, and Virginia outlawed the practice, and in 1969 New Mexico did so as well. Attempting to abolish the death penalty on a state-by-state basis was troubling to
say the least, so death penalty abolitionists then focused their efforts on the courts. On June 29, 1972, they were ultimately successful in *Furman v. Georgia*.

Capital punishment has continued to trend in a downward spiral. If this trend continues, it will be difficult to argue against the bleak future that awaits capital punishment. This decline is not short-term, but long-term; it is plausible to suspect that more states will continue to abolish capital punishment.

The international abolition of capital punishment is important to disclose in this research. In 1931, the year prior to Benjamin Cardozo’s appointment to the United States Supreme Court, he anticipated that “perhaps the whole business of the retention of the death penalty will seem to the next generation, as it seems to many even now, an anachronism too discordant to be suffered, mocking with grim reproach all our clamorous professions of the sanctity of life” (James, 1931). Throughout the past several decades, an astonishing number of countries have united together in the international human rights movement of abolishing capital punishment. Shortly after World War II and the surge of executions of wartime associates that proceeded, the administration of capital punishment in Western Europe began to decrease, and capital punishment for ordinary crimes has been outlawed in all Western industrialized countries excluding the United States (Steiker, 2005). Since 1970, just 54 countries still administer capital punishment, whereas 142 countries have abolished capital punishment either in practice or in law (Garrett et al., 2017). Nations that are the most active in administering the death penalty are
generally those that are least similar socially, politically, or economically to the United States, as these nations are the greatest oppressors of human rights and are the least democratic. China, Iran, Saudi Arabia, and the United States have been the leading nations for administrating the death penalty in recent years. Stephen Bright, capital defense attorney and advocate of abolishing capital punishment, jokes, “If people were asked thirty years ago which one of the following three countries—Russia, South Africa, and the United States—would be most likely to have the death penalty at the turn of the century, few people would have answered the United States” (Bright, 2000).

This statement from Bright cannot be overlooked when examining capital punishment’s future in the United States. The United States simply does not fit the mold as a capital punishment country. This nation offers social, political, and economic freedom and is not a nation that oppresses human rights. The pressure is mounting from other nations, and it is difficult to ignore the blatant discrepancies found in the American criminal justice system compared to other industrialized and democratic nations.

So what is the reasoning behind this vast contrast among the United States and other nations with similar democratic institutions in the administration of the death penalty? During the mid 1960s, the United States appeared similar to Canada, most of Australia, and most of Europe regarding capital punishment. Despite many states in America permitting the death penalty, it was rarely administered. Throughout this decade, the average amount of executions plummeted to an extremely low number every year.
(Bedau, 2010). However, throughout the decades that succeeded the 1960s, capital punishment was eliminated de jure or de facto in the Western democracies. For instance, in 1965 England temporarily abolished capital punishment for murder and permanently abolished it in 1969, Canada in 1976, Spain in 1978, Luxembourg in 1979, France in 1981, Australia in 1984, Ireland in 1990, and Greece in 1993 (Amnesty Int’l, 2018). Also, numerous countries that had previously abolished capital punishment for murder prior to the 1960s transitioned to abolish it for all crimes between the 1970s to 1990s (Amnesty Int’l, 2018).

The chronology of capital punishment reveals that people have been attempting to restrict its usage dating back to decades, centuries, and millenniums. This restriction is not unfamiliar territory both globally and nationally. The morality surrounding the practice has always been a major influential factor regarding its legality, contributing to the prediction of its inevitable abolishment. More and more people have continued to become educated and informed about the flaws of the death penalty process. Since the dawn of the practice civilians have been limiting the punishment of death for convicted offenders.

**B. Evolution of Capital Punishment Methods**

For much of the history of the United States, the main method of execution employed for the death penalty procedure was hanging. Occurring in the town’s center
utilizing a rope tossed over a scaffold or tree, this method was most likely preferred by Americans due to its simplicity and success at conveying a powerful message to all citizens in the community about the repercussions of crime. The moral message acted as a deterrent for those contemplating committing a crime, as all of the public witnessed a human hanging lifelessly from the rope. Hangings became popular scenes; tens of thousands people were present at some hangings, and pastors provided sermons (Dieter, 2008). Following the reinstatement of the death penalty by the Supreme Court in 1976, three offenders have been executed by this method. In 1996, Billy Bailey was the last offender to be executed by hanging in the United States. He opted for hanging rather than lethal injection and was pronounced dead after 11 minutes. In 1993, Westly Dodd was pronounced dead after four minutes, and in 1994, it took six minutes before Charles Campbell’s heart quit beating. U.S. Supreme Court Justice Harry Blackmun voiced in a dissenting opinion in Charles Campbell’s appeal that under optimum conditions, when an offender is hanged “his vertebrae are dislocated and his spinal cord crushed; unconsciousness is immediate and death follows a short time later.” However, he elaborated further and stated that hanging “is a crude and imprecise practice, which always includes a risk that the inmate will slowly strangulate or asphyxiate, if the rope is too elastic or too short, or will be decapitated, if the rope is too taut or too long” (Official Reports of the Supreme Court 1994).
Even though hangings and the associated crowds proceeded well into the 1900s, this radically changed when the method of electrocution joined the market as a feasible replacement in very peculiar circumstances. Edison Company, which was an organization of Thomas Edison, became entangled in a corporate conflict with Westinghouse Electric Company. Edison Company utilized direct current for its electrical systems, and Westinghouse Electric Company was urging for the nation to use alternating current instead. In order to bring to light the hazards of alternating current, Thomas Edison chose to utilize shock tactics. He did this by electrocuting animals with generators from Westinghouse Electric Company in numerous public displays. Thomas Edison had validated his argument, despite doing so in a horrific manner. However, he had also unintentionally invented the electric chair. In 1888, New York tore down its gallows and assembled the first electric chair. In 1890, electrocution was administered for the first time in the United States in this state during the execution of William Kemmler. New York both pioneered and altered the perceptions of capital punishment. This development fulfilled state interests of limiting the turbulence and commiserating nature that derived from hangings because they were administered under one roof and witnessed by only a handful of people. The purpose behind the electric chair also deviated from the purpose behind hanging. The death penalty was no longer a warning to the community about the repercussions of committing a crime, but instead was now retribution on the offender. If
anything went wrong with electrocution (which was often), an advantage was that it
could not be witnessed by all of the community (Dieter, 2008).

In 2007, Daryl Holton was pronounced dead from electrocution after two 20-
second jolts with one 15-second break in the middle of them. In 2013, the last person to
be electrocuted in the United States was Robert Gleason Jr. in Virginia - two 90-second
cycles of 1,800-volt current ultimately resulted in his death. Despite the swift manner of
these two executions, there has been a lengthy succession of botched electrocutions that
have taken substantially more time to complete. In 1985, William Vandiver was
eventually executed after 17 minutes and five cycles of current.

In 1924, cyanide gas became the third method of execution when Gee Jon was
executed in Nevada. It was introduced to be a method of execution that was more
humane. Throughout the 1930s, around 167 executions occurred per year - this was the
most that had occurred in the history of the United States. The offender does not instantly
become unconscious during this method — it takes around 10-18 minutes.

Between 1979 to 1999, just 11 offenders were executed via the gas chamber. This
was mainly due to how disconcerting it was to watch these executions, as well as how
prolonged the length of the deaths by cyanide were. Walter LaGrand was the last offender
to be executed by this method, selecting the gas chamber as his method of execution
instead of lethal injection. For several minutes, he gasped and choked before he was ruled
deceased after 18 minutes. In 1983, Jimmy Lee Gray was pronounced dead just two

25
minutes after the gas commenced, however witnesses expressed that he was not actually deceased. They stated that eight minutes into the procedure in which the viewing room was vacated he was wailing and hitting his head on a pipe. Today, six states authorize lethal gas for execution, however lethal injection is the alternative procedure for all of these states.

Other methods of execution were contested prior to the introduction of lethal injection, but the disputes rarely led to delays greater than a few days, and no method of execution was ruled unconstitutional. The inefficiency of these preceding challenges stemmed from various reasons. One explanation is that the cruel and unusual punishment clause in the Eighth Amendment was not ruled to apply to the states until 1962.

Previously, throughout the history of the United States, only two punishments had been ruled to be in violation of the eighth amendment. There were specific elements of execution that the Court reassessed, but often the arguments were heard swiftly and without considerable delay to both the individual execution and the entire capital punishment system. The case of William Kemmler, who was the first person to be executed by electrocution in the United States, demonstrates how quick the Court actually was. After Kemmler was denied relief by the New York courts, his attorney filed a petition to the United States Supreme Court that contested the method of execution on May 5, 1890. Arguments were heard before the Court on May 20 and Kemmler was
denied relief just three days after. Only three months following the filing of his appeal, Kemmler was executed on August 6 (Dieter, 2008).

The Court spent more time deliberating whether sentencing someone to electrocution twice qualified as a cruel and unusual punishment, however these executions were still not outlawed. On May 3, 1946, juvenile offender Willie Francis initially survived his electrocution because the electricity administered was ineffective in ending his life. He was then brought back to his cell, and his appeals ultimately made their way to the United States Supreme Court. On January 13, 1947, the Court ruled that any additional pain that Francis would experience from a subsequent electrocution was an unanticipated result of the initial electrocution, and therefore did not reach the level of cruel and unusual punishment. Four months later, Francis was electrocuted to death on May 9, 1947 (Dieter, 2008).

The Court ruled in 1976 that both the death penalty and the statutes of some states were constitutional, executions did not recommence in large numbers because the law was still being construed. In 1977, the death penalty for rape was outlawed. In 1982, the death penalty for felony murder was outlawed. Executions began to rise in the late 1980s and culminated to nearly 100 executions in 1999. Objections regarding the constitutionality of lethal injection were not effective during this time of elevated support and increased execution. Arguments about the methods of execution were perceived to be “frivolous” and were viewed to be delay strategies. A sequence of disconcerting
exonerations of death row offenders and the arrival of DNA testing started to shift the perception of the death penalty. Cases in which a defendant’s innocence was subsequently discovered clearly revealed that there were significant errors in the states’ administration of the death penalty. Death penalty sentences decreased, executions fell, public support dwindled, and cases began to be assessed with greater inspection (Dieter, 2008).

As the death penalty stalled, a succession of electrocutions in Florida once more posed the question of whether a specific method of execution could be ruled unconstitutional. During the execution of Pedro Medina by method of electrocution on March 25, 1997, flames reaching a foot high launched from his headwear. The execution chamber was consumed with heavy smoke, choking the 24 official witnesses. Also, during the execution of Allen Lee Davis on July 8, 1999, blood from his nose spewed onto his white shirt’s collar, and blood flowed all throughout his chest. When Florida’s electric chair was later argued in state court, Florida Supreme Court Justice Leander Shaw detailed the execution of Davis and mentioned, “[t]he color photos of Davis depict a man who - for all appearances - was brutally tortured to death by the citizens of Florida” (Provenzano v. Moore, 51-52). Despite this, the constitutionality of electrocutions was confirmed by the majority of the Florida court (Dieter, 2008).

The United States Supreme Court ultimately granted certiorari to review whether the administration of electrocution in the state of Florida was constitutional (Dieter,
2008). Florida promptly convened a session among its legislature and replaced the method of electrocution with legal injection. In California, the United States Court of Appeals for the ninth Circuit ruled that California’s administration of lethal gas was a cruel and unusual punishment, and was therefore unconstitutional. California and Georgia replaced the gas chamber method with lethal injection. The final blow to electrocution took place in 2008 when the Supreme Court of Nebraska ruled against electrocution, ruling that it imposes “intense pain and agonizing suffering,” and “[c]ondemned prisoners must not be tortured to death, regardless of their crimes” (State v. Mata, 2008).
Chapter II: The Legality of Capital Punishment

Capital punishment presents the ultimate punishment: death. The word capital originates from the Latin word *capitalis*, meaning “of the head.” Because the governing structure of the United States rests on the separation of federal and state powers, individual states traditionally hold the power to determine whether to permit the administration of the death penalty. Federal executions also occur if an individual has been convicted of a federal crime and the crime is handled by federal courts instead of state courts, which occurs less frequently. Currently, 27 states in America authorize the death penalty. Examining the legality of capital punishment over time, it is extremely evident that the Supreme Court continues to shift further away from capital punishment with each ruling. This chapter examines the numerous Supreme Court rulings on capital punishment that have occurred over the century and their impact on the current status of capital punishment. Throughout the decades, the Court has been narrowing the eligibility of the death penalty and has also been tightening the limitations of the practice. It is reasonable to infer that future Supreme Court cases targeting the death penalty will follow this pattern of increasing limitations, ultimately reaching the point of abolishment one day in the future.

The Legislative Powers section of the Constitution grants Congress the power to create laws concerning specific issues of federal concern. Listed in Article 1, Section 8, these powers are referred to as the Enumerated Powers. At the end of the Enumerated
Powers list, the Necessary and Proper Clause designates Congress the power to hold any law “necessary and proper” to execute the remaining laws. Because general powers of crime and punishment are conventionally held by the states, capital punishment is frequently administered by state governments. When states administer the death penalty, they must comply with the protections found in the Bill of Rights and Constitution. The Sixth and Eighth Amendments found in the Bill of Rights concern capital punishment. The Eighth Amendment applies to both the federal and state governments, protecting individuals against “cruel and unusual punishment.” The Sixth Amendment ensures that the defendant has the right of a jury to determine the facts of the case, not the judge, and it also requires unanimous jury rulings. The Fourteenth Amendment contains a right to Procedural Due Process, which guarantees fairness in the process when an individual’s life, liberty, or property rights could be detracted. For instance, Procedural Due Process constitutes the right to confront opposing witnesses and the right to a fair trial in the states.

In the 1910 Supreme Court case *Weems v. U.S.*, the Supreme Court ruled that the protection against cruel and unusual punishment signifies that “punishment for [a] crime should be graduated and proportioned to [the] offense” (*Weems v. United States*, 1910). It established that excessive punishments that were not proportionate to the crime could constitute “cruel and unusual.” Justice McKenna delivered the majority opinion, stating that the Eighth Amendment “may be therefore progressive, and is not fastened to the
obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice.” Judge McKenna introduces an altered conception of the Eighth Amendment, one in which “cruel and unusual” is decided by public opinion and ideals. The Court’s decision strengthened the notion that there is no sufficient all-inclusive definition of the Eighth Amendment.

Even though *Weems v. U.S.* was not a capital punishment case, it laid the groundwork for the proportionality rule. Justice McKenna’s statement that the public determines what is considered “cruel and unusual” is very powerful. In the present day, the majority of the public does indeed hold capital punishment to be “cruel and unusual.” Standards of decency have shifted, and the public no longer supports the punishment of death.

### A. Notable Supreme Court Cases

The landmark case *Furman v. Georgia* temporarily abolished the administration of capital punishment in the United States. Intending to determine whether under the Eighth Amendment, capital punishment was an unnecessary or overindulgent punishment, Justice Thurgood Marshall specified “six purposes conceivably served by capital punishment: retribution, deterrence, prevention of repetitive criminal acts, encouragement of guilty pleas and confessions, eugenics, and economy.” Prior to this case, there was great concern that capital punishment was being administered
inconsistently and arbitrarily, under statutes that granted juries and prosecutors unchecked discretion when deciding which offenders should be sentenced to death. This arbitrariness resulted in the Supreme Court’s decision to outlaw the death penalty in the United States in this case. Justice Potter Stewart stated in the majority “These death sentences are cruel and unusual in the same way that being struck by lighting is cruel and unusual … the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed” (Furman v. Georgia, 1972). Chief Justice Burger predicted after Furman, “There will never be another execution in this country” (Woodward & Armstrong, 2005).

Because the Court ruled that the current practice of capital punishment was unconstitutional, the Court essentially opened the doors for the states to amend their death penalty laws in a way that would not violate the Eighth Amendment. In addition to ruling against the death penalty because of its discrimination and arbitrary nature, the Court held that states must limit who is eligible to receive the death punishment. Because of this, states were now able to permit the use of the death penalty through legislative reform that removed the prejudiced and arbitrary laws that formerly controlled the process. By 1975, there were thirty states that had ratified death penalty laws, as well as almost 200 people on death row.

Before Furman v. Georgia, the majority of capital offenders were deemed eligible by state capital punishment schemes, and there was no counsel of determining which
offenders should be executed. In this major Supreme Court case, the Supreme Court Justices ruled this unconstitutional, abolishing capital punishment. A shared theme surfaced among the opinions of Justices Douglas, Stewart, and White, which shaped the decision. The fundamental idea among all three opinions was the issue that only an extremely low percentage of offenders was actually receiving the death sentence, despite the multitude of offenders who were eligible for capital punishment. All of the opinions also voiced concern that jurors were selecting this small percentage of offenders on a discriminatory and subjective premise.

Justice Stewart expressed, “of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed” (*Furman v. Georgia*, 1972). Justice Stewart’s prominent issue was that the death penalty sentences were “cruel and unusual in the same way that being struck by lightning is cruel and unusual” (*Furman v. Georgia*, 1972). According to Justice Stewart, death sentences were sparked by mere chance, rather than impartial judgment. Justice White expressed the same concern that sentencing the death penalty so infrequently signified a situation that “no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not” (*Furman v. Georgia*, 1972). Justice White also expressed that capital punishment’s ability to provide “a credible deterrent or measurably to contribute to any other end of punishment in the
criminal justice system” was ruined by the infrequent sentencing of the death penalty. Justice Douglas voiced that the issue with selecting just a handful defendants out of the numerous defendants eligible for the death penalty was the threat that these decisions would stem from inappropriate factors such as class or race. Justice Douglas held that the framework before *Furman v. Georgia* was “pregnant with discrimination,” resulting in a situation that entailed death sentences being “disproportionately imposed and carried out on the poor, the Negro, and the members of unpopular groups” (The Challenge of Crime in a Free Society, 1967).

After the Supreme Court’s ruling in *Furman v. Georgia*, states transformed quickly in order to amend their capital punishment statutes. 15 states administered mandatory death-sentencing schemes which required for the death penalty to be administered following convicting an offender of a capital crime. However, all other states adopted “guided discretion” statutes that required finding at least one statutory factor in order to sentence the death penalty. In *Gregg v. Georgia*, four years following the *Furman* decision, the Supreme Court validated this model in a plurality opinion by Justice Stewart that Justices Powell and Stevens also joined. This plurality opinion commended the constriction of jurors’ discretion due to requiring the aggravating factor, as there was less of a chance that the jurors would act “wantonly and freakishly” (*Gregg v. Georgia*, 1976). Justice White voiced in his concurring opinion that the requirement of an aggravating factor would counterbalance the rarity of death sentences associated with
sentencing prior to Furman. He asserted that the types of homicide that qualified for the death penalty became “more narrowly defined and… limited to those which are particularly serious or for which the death penalty is peculiarly appropriate as they are in Georgia by reason of the aggravating-circumstance requirement,” there would be a greater likelihood that jurors would “impose the death penalty in a substantial portion of the cases so defined” (Gregg v. Georgia, 1976). White acted in an extremely prescient manner when predicting the future course of the death penalty. Therefore, Gregg v. Georgia visualized a death penalty arrangement consisting of aggravating factors that significantly restricted the range of jurors’ discretion. Because of this restricted discretion to more modest and liable subdivision of offenders, the death penalty sentences would be imposed with greater regularity. However, Gregg did not enumerate the mitigating factors, still stacking the deck in favor of the prosecution.

In Furman v. Georgia, the U.S. Supreme Court ruled that death penalty laws which allow juries to have complete control constitute cruel and unusual punishments of the Eighth Amendment. In many landmark capital punishment cases that followed, the Supreme Court minimized the reach of the death penalty. For instance, in Woodson v. North Carolina, the Court ruled that mandatory death sentences violated the Eighth and Fourteenth Amendments (Woodson v. North Carolina, 1976). One year later, the state’s ability to execute citizens was once again reduced in Coker v. Georgia, now removing the crime of rape from the list of eligible crimes (Coker v. Georgia, 1977). In Enmund v.
Florida, only those who actively planned, attempted, or succeeded in the murder of another human being were ruled eligible for the death penalty by the Court (Enmund v. Florida, 1982). The aforementioned cases were significant because they all restricted the eligibility of the death penalty.

The majority of state legislatures adopted the Model Penal Code’s guided discretion model in an attempt to draft capital punishment statues to act in accordance with Furman (Sharon, 2011). The Model Penal Code defined eight aggravating factors and the jury was obligated to identify at minimum one of the factors prior to a defendant being eligible for the death penalty. Yet since the original drafting of these statutes that followed after Furman, aggravating factors “have been added to capital statutes… like Christmas tree ornaments,” resulting in the death penalty being eligible for more and more defendants (Sarat, 2001). During the 1980s and 1990s, additional factors targeting criminal gang membership, drug offenses, and drive-by shootings were added by state legislatures (Fagan et al., 2006). Ever since these additions surfaced, lists of aggravating factors have continually increased by the state legislatures, and since 1995, over twenty states have expanded the factors. Ten or more aggravating factors are listed by most death penalty statutes, and over fifty are listed in total by death penalty statutes throughout the United States (Kirchmeier, 2006).

Numerous critics have great concern for the significant growth of these aggravating factors, expressing that these “ever-expanding lists of ever-more broadly
interpreted capital eligibility factors” as the “most significant remaining flaw in the administration of the capital justice system…” (Liebman & Marshall, 2006).

Commissions that have been given the task of reforming and improving capital punishment systems for states have also advised that statutory lists of aggravating factors be substantially minimized (Hoffmann, 2005). Despite these efforts, state legislatures have demonstrated great opposition in approaching these issues and counsel. For instance, even though an Illinois reform commission unanimously advised to decrease the list of aggravating factors in the state, this proposal was not included when the state legislature passed a death penalty reform bill. Researchers at Columbia University Lawrence Marshall and James Liebman note that “even as many legislatures have examined flaws in their death-penalty systems, and even as study commissions have called for narrowed capital-eligibility criteria, the states have taken virtually no steps to restrict their statutory lists of factors…” (Liebman & Marshall, 2006).

This fervor for more and more aggravating factors has led to the unseemly side of capital punishment being revealed. Now, more people recognize that its administration is not as just as it may seem, and the problems that led to the Furman ruling are resurfacing. The additional factors have complicated the nature of the capital punishment process even more. This issue adds to the already-existing list of flaws that have been exposed in the capital punishment process. The additional discrepancy weakens the argument made
in support of capital punishment and offers support for an already strong argument against the practice.

Expansive capital punishment statutes do not succeed in limiting an extremely culpable class of offenders due to failing to distinguish a subgroup in any manner, and rather recording such a great amount of aggravating factors that almost every homicide offender becomes eligible for the death penalty. A study conducted by the Baldus group disclosed that within a time frame of five years in the state of Georgia, 86% of offenders convicted of homicide were eligible for the death penalty according to Georgia’s post-*Furman* statute, and studies in other states likewise uncover extensive ranges of death eligibility (Baldus et al., 1990).

Despite the attempts of many state legislatures to expand the reach of capital punishment, the Supreme Court has continued its long trajectory of limiting to whom the practice is applied. In 1986, the United States Supreme Court ruled in *Ford v. Wainwright* that the execution of an insane individual constituted a cruel and unusual punishment, violating the Eighth Amendment. The justices relied upon English common law in the Court’s decision, because there was no precedent in the nation’s legal history regarding the execution of insane individuals. English law specifically prohibited the execution of the insane; the English jurist Sir Edward Coke expressed that although executing a criminal was to act as an example, executing an insane individual was “extreme inhumanity and cruelty, and can be no example to others” (Moriarty, 2001).
After the reinstatement of capital punishment in 1976, *Thompson v. Oklahoma* was the first case that outlawed the death penalty for minors. 15-year-old William Wayne Thompson was found eligible to be tried as an adult, convicted of first degree murder, and sentenced to death. The Court held that executing Thompson would violate the Eighth Amendment’s ban on cruel and unusual punishment as applied to the states through the Fourteenth Amendment (*Thompson v. Oklahoma*, 1988). Justice Stevens expressed in the majority opinion that executing an individual under the age of 16 would violate the “evolving standards of decency that mark the progress of a maturing society.”

In 2002, the Supreme Court ruled in *Atkins v. Virginia* that the execution of intellectually disabled offenders violated the ban in the Eighth Amendment against cruel and unusual punishment (*Atkins v. Virginia*, 2002). In 2007, the Supreme Court identified additional specific criteria for determining which offenders were ineligible for execution in *Panetti v. Quarterman*, highlighting again the penchant for narrowing the classes of individuals who could be executed. Importantly, this trend has continued even as the Supreme Court has grown more conservative. The Court also prohibited sentencing criminal offenders to death if they do not understand the reasons for their execution (*Panetti v. Quarterman*, 2007).

In the 1987 case *McCleskey v. Kemp*, the Supreme Court was presented with evidence of the capital punishment system’s racial bias, but ultimately ruled that there was no Constitutional violation from the significant risk of racial discrimination.
(Kirchmeier, 2015). Some Supreme Court Justices during this time acknowledged the correlation among race and capital punishment, despite the majority opinions disregarding the issue. This could no longer be ignored in *McCleskey v. Kemp*; attorneys provided statistical evidence of racial discrimination in the capital punishment system. In particular, defendants similar to McCleskey — who had murdered a white individual during a robbery — had over twice the likelihood of receiving the death sentence compared to defendants who murdered an African American individual. McCleskey’s attorneys were certain that they had presented compelling evidence of the arbitrariness and racial prejudice of capital punishment. However, this evidence would ultimately not match the attorneys’ expectations. This case was important because it revealed the racial discrepancies that plague capital punishment. It was a catalyst that opened the eyes of the American people to these injustices.

The Court’s majority opinion in *McCleskey v. Kemp*, written by Justice Lewis Powell in a contested 5-4 decision, acknowledged that the study’s results about the threat of racial discrimination in capital sentencing were accurate. Nevertheless, the Court established that the evidence did not constitute a violation of either the Eighth Amendment or the Fourteenth Amendment. Justice Powell established that although the results appeared discriminatory, this did not indicate that McCleskey was sentenced disproportionately to the crime in violation of the Constitution. The Supreme Court contended that death penalty sentencing procedures themselves were still fair.
Concerning any disparities that corresponded with race, Powell recognized that “[a]pparent disparities in sentencing are an inevitable part of our criminal justice system” (*McCleskey v. Kemp*, 1987).

Outside of the constitutional arguments in *McCleskey v. Kemp*, there was disagreement among the majority and dissenting opinions about the possible impact the case would have in the future. Justice Powell voiced concern at the end of the majority opinion, asserting that a ruling in favor of McCleskey could possibly sabotage the entire criminal justice system. The majority attested that a ruling in favor of McCleskey could result in other defendants inciting similar claims regarding racial discrimination and other capricious factors in all types of criminal cases. Justice William J. Brennan Jr. responded to the majority’s fear in his dissent. Noticing that the court’s concerns could possibly portray a “fear of too much justice,” he argued that a ruling in favor of McCleskey would not have to be as far-reaching as the majority expected. Taking into account the cases that preceded *McCleskey*, the Court’s ruling could have been restricted to capital punishment and race without difficulty (Kirchmeier, 2015).

*McCleskey v. Kemp* was a critical Supreme Court case that remains influential to this day. It brought attention to the major flaws in the American death penalty debate that impact Americans’ current perceptions of capital punishment. The research developed by the study fostered changes in the debate, endeavors to confront racial discrimination through legislation, and also attempts to abolish the death penalty by several states.
Supreme Court Justice Powell, who wrote the majority in *McCleskey*, was asked after he retired if he was regretful of any of his decisions during his tenure as a Supreme Court Justice. He replied that he wished he had abolished the death penalty in *McCleskey v. Kemp* (Kirchmeier, 2015). Many other Justices such as Harry A. Blackmun and John Paul Stevens have voiced regret in supporting and upholding capital punishment in their previous decisions. Both Justices expound upon their changed beliefs partly by referencing the racial discrimination evidence that was presented in *McCleskey v. Kemp*. The decision ruled in *McCleskey* continues to evoke the emotions and memories of so many Americans. As these Supreme Court justices continued to review more and more flawed death sentences during their tenures, the greater they recognized the inequality and arbitrariness of capital punishment. This offers support of the present dwindling nature of capital punishment — people are continuing to realize that capital punishment may have seemed appropriate in the past, but there is no longer a place in our nation for a system consumed with so many flaws and injustices.

Courts have permitted certain aggravating factors that are so far-reaching as to feasibly be applicable to all murders. For instance, the Supreme Court has authorized aggravating factors that pertain to all offenders perceived to be “cold-blooded, pitiless slayers” or to have executed “senseless” crimes (*Walton v. Arizona*, 1990). State courts have also placed general and unspecific interpretations to aggravating factors that they regard being constitutionally permissible. The Illinois Supreme Court has construed that
the “cold, calculated and premeditated” aggravating factor pertains to offenders who deliberated for merely three hours prior to perpetrating the homicide (People v. Brown, 1996). Frequently courts acquire inaccurate or speculative procedures when determining whether aggravating factors have the ability to make most offenders eligible for the death penalty.

The Supreme Court ruled in the 2002 case Ring v. Arizona that the Sixth Amendment guarantees a jury the right to decide on the aggravating factors in order to determine whether or not to impose the death penalty (Ring v. Arizona, 2002). In 2003, the Supreme Court ruled in Wiggins v. Smith that failure of a criminal defendant’s legal counsel in fully investigating the defendant’s background and presenting mitigating evidence about his troubling life history at his capital sentencing proceedings violated his Sixth Amendment right to effective assistance of counsel (Wiggins v. Smith, 2003).

In 1989, the Supreme Court ruled in Stanford v. Kentucky that imposing the death penalty on convicted capital offenders younger than 18 did not violate the Eighth Amendment’s prohibition against cruel and unusual punishment (Stanford v. Kentucky, 1989). However, the Court overturned the Stanford decision in the 2005 landmark case Roper v. Simmons, ruling that capital punishment was prohibited for juvenile offenders. The Court held that this violated the Eighth Amendment because sentencing the death punishment to a juvenile was incompatible with national principles of decency (Roper v. Simmons, 2005). The Court recognized the moral injustice of executing an individual
younger than 18, altering a previous ruling. This demonstrates that the Court is entirely capable of ruling against capital punishment in its entirety in the future. Standards of decency have shifted to the point where the American people no longer view execution as an acceptable form of punishment.

In the 2008 case *Kennedy v. Louisiana*, the Supreme Court ruled that capital punishment for those convicted of raping a child that did not result in death and death was not the intended result violated the Eighth Amendment, due to the disproportionality among the sentence and crime (*Kennedy v. Louisiana*, 2008). The same year, the Supreme Court ruled in *Baze v. Rees* that lethal injection was lawful and did not classify as cruel and unusual punishment. Responding to the petitioners’ objection that the threat of mistakes during the execution procedure was so large that it should be rendered unconstitutional, Chief Justice John Roberts held that “an isolated mishap alone does not violate the Eighth Amendment” (*Baze v. Rees*, 2008). However, there has not been just one single mishap that has occurred during executions throughout the years. This argument made by Chief Justice Roberts has lost its validity from the multitude of execution blunders that many offenders have endured. The miscues in execution protocol are revealed in greater detail later in this research, however it is notable to identify how Roberts’ statement from 2008 is no longer valid in 2021.

In 2015, *Glossip v. Gross* was an important Supreme Court ruling because the dissenting opinions provided a potential indication of future discourse and hesitance from
the Supreme Court to the constitutionality of capital punishment. The majority held that because capital punishment is constitutionally legal and the possibility of pain is immanent during execution, there is no requirement by the Eighth Amendment that a method of execution must exclude any chance of pain. Rather, a method of execution that abides by the Eighth Amendment must issue a suitable alternative that exhibits a substantially lower risk of pain, a requirement that could not be fulfilled by the petitioners (Glossip v. Gross, 2015). Justice Antonin Scalia expressed in his concurring opinion that the Constitution unequivocally deliberates over the death penalty when taking into account the possibility that a person might be “deprived of life,” and consequently capital punishment cannot be unconstitutional. Scalia asserted that arguments over the inconsistency and unreliability of capital punishment are not concerns about punishment, but rather conviction, and are innate hazards in the jury trial process. Determining whether to sentence an offender to the death penalty embodies the type of ethical and moral compass that the jury should continue to hold (Glossip v. Gross, 2015).

The dissenting opinion, written by Justice Stephen G. Breyer and joined by Justice Ruth Bader Ginsburg, argued that whether or not a punishment is regarded as constitutional must be assessed according to current, prevalent legal and social standards, thus, capital punishment is not constitutional anymore. Justice Breyer referred to studies demonstrating that the exoneration rate is exceeding disproportionate for capital crimes, which reflects both cases that involve procedural error and cases that involve discovering
a defendant’s innocence. For this reason, capital punishment is not consistently implemented in cases that entail the defendant being appropriately convicted of crimes that are severely reprehends. Justice Breyer also expressed how studies have demonstrated that there are factors excluding the crime’s heinousness which impact sentencing the death penalty, such as political pressures, genders and races of the victim and the defendant, and the location of the crime; the unconstitutional cruelty of the punishment ensues from this erratic, inconsistent imposition. It was also argued that because the administration of capital punishment necessitates added procedural provisions, there are frequently lengthy delays after sentencing and preceding execution.

Justice Breyer also contended that the United States has steadily been distancing itself from the employment of capital punishment, to the extent that it is administered so rarely as to be regarded “unusual” for the grounds of the Eighth Amendment. In a separate dissenting opinion, Justice Sonia Sotomayor argued that under the Eighth Amendment, petitioners for relief do not have an obligation to present a suitable alternative, since a cruel execution method does not become constitutional only because there are no other alternatives (Glossip v. Gross, 2015). Even though the dissenting opinions did not alter the legality of capital punishment in the United States at that time, some individuals perceived it to be an indication of the Supreme Court’s receptiveness to question the constitutionality of the death penalty in subsequent years.
The momentum gathered from *Glossip v. Gross* subsided following the November 8, 2016 election day. Three states, California, Nebraska, and Oklahoma, had ballots that involved the legality of capital punishment. Voters in California voted on either abolishing or accelerating capital punishment, voters in Nebraska voted on reinstating capital punishment following the state legislature’s repeal in 2015, and voters in Oklahoma voted on preserving and incorporating capital punishment in the state’s constitution. In all of these states, the choice to reinstate or rejuvenate capital punishment was victorious. However, it is evident that the Supreme Court of the United States has contributed to the decline in capital punishment. One by one, each Supreme Court decision has resulted in more and more restriction for the death penalty. The Court’s interpretation of the Cruel and Unusual Punishments Clause in the Eighth Amendment is also significant. Most Justices have continued to state that the Court will examine the actions taken by state legislatures and the extent to which a punishment is imposed when determining if it aligns with the nation’s standards of decency. If more states continue to abolish the death penalty, and the number of death sentences and executions continues to drop, there may be an appropriate time for this evaluation from the Supreme Court. Despite some states expanding capital punishment in recent years, the Supreme Court has contributed to the decline of capital punishment that has overpowered these actions.
Chapter III: Capital Punishment in the Present Day

Lethal injection is the current method of execution in the United States that is employed by all states. Since 1976, lethal injection is the fifth method of execution used in the United States, following the methods of firing squad, hanging, electric chair, and gas chamber. Lethal injection is viewed as a method that limits pain and suffering, especially compared to earlier methods. Unlike other methods it is supposed to be compassionate, however this is currently up for debate. Unlike hangings and electrocutions, lethal injections were not intended to be spectacles or to terrorize the offender. There were even laws passed by states that permitted the families of the victims to watch the execution, in addition to the defendant’s family. There was assurance within the states that a tranquil death would be reported by witnesses (Dieter, 2008).

Lethal injection is now regarded by many Americans as a method consumed with error, state misemployment, and possible violation of human rights (Dieter, 2008). Similar to how there is no method to guarantee the dependability of prosecutors, judges, and juries, it seems that there is no guarantee that the lethal injection method will be pain free and humane. As the public continues to become more informed about the possible issues and seeks greater accountability, the continual involvement of medical professionals will increasingly be needed. Because of the recent drug bans and shortages, numerous states are utilizing substitute chemicals when administering lethal injections. In 2016, Pfizer banned the sales of its chemicals, affecting many states that administer a
combination of drugs during lethal injections. Over 20 states faced difficulty in carrying
out executions because of this ban from Pfizer (Scientific American, 2016). The use of
substitute chemicals in lethal injections has resulted in drawn out executions. In April
2014, Clayton Lockett became conscious again during his procedure, so Oklahoma
officials stopped the lethal injection. However, he ultimately died 43 minutes after the
procedure initially commenced. In July 2014, Joseph Wood gasped for air hundreds of
times and was alive for almost two hours after he was injected with an unknown drug that
had not once been previously administered.

A. Racial and Economic Disparities of Capital Punishment

In the current American legal system, racial discrimination is stringently outlawed
and laws are race neutral. Despite this, in the capital punishment process, racial
discrepancy has habitually generated a distinction in the outcomes of death penalty cases.
Research has routinely proven that the prominent factors that influence the outcomes are
social class, race, and the caliber of legal counsel. Consequently, the group that has the
highest probability to be sentenced the death penalty are African Americans with
insufficient legal counsel who are convicted of brutal crimes against caucasian victims
(Ogletree & Sarat, 2006). These findings reveal a “steep descending order of death
sentence probability” ranked like so: “(1) Black kills white (2) White kills white (3)
Black kills black (4) White kills black” (Black, 1982:101). Since 1976, the United States
has executed black offenders with white victims thirteen times more than white offenders with black victims. Racial attitudes place priority of caucasians over that of African Americans regarding human value. Abolitionists of capital punishment contend that because racial discrimination is unfeasible to eradicate from the role it plays in deciding which individuals to sentence the death penalty to, the only way to solve this issue is to suspend executions completely (Stichter, 2014). Therefore, racism will have no merit in decisions involving life and death, and underrepresented races will not be treated unjustly.

Most of the policy regarding capital punishment is determined at the state level. Of the 1,400 people that have been executed in the United States since 1973, state statutes have sentenced almost all of them. In the northern region of the United States, there is a heavy concentration of abolitionist states, and contrarily the southern region of the country is composed extensively of execution states. From the time that punishment was reinstated in 1976, more than 70 percent of executions in the country have been administered by southern states. Texas is responsible for over a third of the 1,000 executions that have occurred between the time period of 1976 and present day (Garland, 2007). Studies have shown that in conservative regions of the United States, particularly in the South, defendants are more likely to have a lower-cost defense (Gould & Leon, 2017). These conservative areas are greater advocates of the death penalty, placing greater value on crime control than due process. It should be of no surprise, then, that
capital defendants are given less resources to guard their liberties and defend themselves in judicial districts that hold these views (Gould & Leon, 2017).

The state of California has the largest death row in the United States and leads the nation in homicides. Pierce and Radelet (2005) studied the time period between 1990 to 1999 and found that the percentage of African American victims is extremely high (Pierce & Radelet, 2005). Supporting a previous study’s findings, they also concluded that counties that have denser populations have decreased capital punishment sentencing rates compared to other counties. Examining 262 capital punishment sentences in California, Pierce and Radelet discovered, “The whiter the county, the higher its death sentencing will be.” There have been numerous studies that have investigated the role that prosecutorial discretion plays in inquiring capital punishment, as seen in a study conducted by Songer and Unah (2006) that examined homicides in South Carolina from 1993 to 1997. These professors inspected geography and discovered that prosecutors had a greater likelihood to seek capital punishment in counties that were more rural. In a similar study conducted by Baldus, Woodworth, Grosso, and Christ that examined capital punishment in Nebraska from 1973 to 1999, they detected that the rates of capital punishment from urban areas were lessened compared to other counties. It can be gathered from the numerous studies of individual counties that around the 1980s and 1990s, substantial disparities surfaced between county-level sentencing patterns regarding states that instituted the death penalty. Because of the inconsistent practices of
local prosecutors in determining whether to seek the death penalty, this has resulted in a
discrepancy among urban and rural areas. Studies have found that urban areas have
decreased rates of capital punishment sentencing compared to rural areas.

Defense resources have also been found to have a correlation with the courts’
workload and overall pace. In courts that have more caseloads and quicker disposition
rates, minimal resources were given to defendants for their defense. One may presume
that the demand to expedite case processing generates a type of environment in which
defense counsels are pressured, or forced to accept, that they will dedicate less time and
energy to representing (Gould & Leon, 2017).

It has also been discovered that the experience and esteem of defense attorneys
are linked with the court’s resources they grant the defendant. Defense attorneys that do
not have notable experience in representing defendants in capital cases generally had the
least costly defenses, in addition to attorneys who the Offender of Defender Services or
local federal public defender did not support their appointment to the case. Capital
defense is a specialized area, one in which more accomplished and acclaimed attorneys
can allocate more time to cases and acquire expert assistance during their investigation of
cases and representation of their clients (Gould & Leon, 2017).

There is also disparity among the legal counsel provided to defendants. The late
Justice Ruth Bader Ginsburg once stated in 2001, “People who are well represented at
trial do not get the death penalty.” The poorest defendants are commonly affected the
most, who may be “defended by lawyers who lack the skills, resources, and commitment to handle such serious matters” (Bright, 1994). Researchers have found that sentencing a defendant to death is less likely to occur if the victim is of low social status, depicted by unemployment, public housing, low-skill occupation, criminal history, failure to complete high school, gang membership, and mental retardation. A study that was conducted several years later found that with every unit increase in the victim’s occupational esteem — from low to moderate to high — increased the probability of the death penalty being sentenced. Additionally, a study conducted by researcher Scott Phillips in 2009 found that the likelihood of a defendant being sentenced to death is six times greater if the victim is reputable, refined, integrated, and conventional (Phillips, 2009).

The aforementioned research has uncovered an alarming trend of capital punishment in the United States. A strong correlation has been found among extraneous factors (socioeconomic status, wealth, and race) and the likelihood of receiving a death sentence. The plethora of disturbing facts about capital punishment has resulted in a dramatic downturn in its use and dwindling support. Because the Supreme Court examines the evolving standards of decency in a society when establishing whether a punishment is cruel and unusual, the future of capital punishment is contingent on public opinion.

The aforementioned social and racial inequities are incorporated into this research because they offer support that the moral standards of decency in the United States have
shifted. This holds substantial weight in predicting capital punishment’s eventual downfall and subsequent abolishment. In *Trop v. Dulles*, Chief Justice Earl Warren stated that the Eighth Amendment “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.” Because capital punishment cases are based on the Eighth Amendment, there is a convincing argument that capital punishment does not align with today’s standards of moral decency. The word “unusual” in the Eighth Amendment conveys that the types of punishments prohibited by the constitution should shift throughout time, as certain methods of punishment lose society’s approval and therefore become more unusual. The increasing uncertainty surrounding the practice and decline in number of executions make a convincing argument.

The social inequities surrounding capital punishment initially resulted due to de jure segregation, but now stems from de facto segregation. All racial groups are now granted equal rights and protections according to constitutional law. However, factors such as geography, wealth, quality of legal counsel, jury attributions, have naturally segregated the likelihood capital punishment between whites and African Americans. Also, de facto abolition of the practice continues to rise. Nationally, in many counties and states the death penalty has not technically been abolished legally, however, it is no longer used as a form of punishment. Globally, de facto abolition of the death penalty is found in many countries. Many nations retain the death penalty legally, although have not administered executions for ten or more years.
The research analyzed in this chapter are examples of how capital punishment is arbitrarily applied and discriminatory. According to the Court’s very own rules (evolving standards of decency), this leads one to predict that one day — when people actually internalize this information — the death penalty will go by the wayside.
Chapter IV: Public Opinion on Capital Punishment

Throughout capital punishment’s history, the practice has been tied to the opinions of the American people. For instance, the Supreme Court frequently considers public opinion when determining its ruling on capital punishment procedure and statutes. In *Atkins v. Virginia* and *Roper v. Simmons*, the public’s opinions towards executing those who are juveniles or cognitively impaired held substantial weight in the Supreme Court’s rulings. Also, legislative, political, and prosecutorial discussion and rhetoric encompassing capital punishment often depends greatly on the attitudes of the public. One study conducted that examined the effect of the attitudes of the public on beliefs for capital punishment revealed that the support of capital punishment appears to be correlated with recognitions of personal accountability, and is also correlated with a person’s ability to view severe action like execution as morally warranted and isolate themselves from others (Vollum, 2009). It is evident that support and attitudes of the death penalty are not particularly stable or consistent. This was demonstrated when Supreme Court Justice Thurgood Marshall predicted in *Furman v. Georgia* that if people knew about the realities of the death penalty, support for the punishment would decrease or cease to exist.

The popular opinion of Americans regarding capital punishment has drifted away from capital punishment. A poll conducted by Gallup in November 2019 detected that 60% of Americans were in favor of life in prison over the death penalty. The results of
this poll are notable to highlight — Gallup has been collecting data on public views of the
death penalty for over 30 years, but this was the first time that there was greater support
for life imprisonment instead of capital punishment. Gallup conducted another poll in
November 2020 which revealed that public support for the death penalty is currently the
lowest in a half-century (National Polls and Studies).

A. Factors that Influence the Public’s Opinion: Race and Gender

Race and gender are the two prominent sociodemographic factors that shape
attitudes toward capital punishment. There have been numerous studies conducted
demonstrating that race is extremely impactful, particularly in the greater negative
attitudes toward the death penalty from African American respondents compared to
caucasian respondents (Dotson & Carter, 2012). In one study, 78% of African American
respondents stated that sentencing individuals to the death penalty is biased, and just 42%
of caucasian respondents expressed similar beliefs (Murray, 2005). A study conducted in
2007 found that 65% of whites support the death penalty, whereas only 50% of African
Americans show support. It is frequently noted that there is a correlation among racism
and support for the death penalty (Barkan & Cohn, 1994). Another study has found that
white racism is the greatest predictor of supporting the death penalty (Unnever & Cullen,
2007). Researchers have also indicated that individuals who are fearful of minorities tend
to exhibit increased support of the death penalty in America and in western European countries.

Various other studies have examined the role of gender in the public’s attitudes, and findings routinely demonstrate that men typically voice support in favor of capital punishment compared to women (Dotson & Carter, 2012). The greatest level of support for capital punishment is found among white men, and the weakest levels of support for capital punishment is held among African American men and women. White women fall in the middle, revealing greater levels of support than African American men and women, but lower levels of support compared to white men. However, among African Americans, when given the argument that capital punishment is racially biased, men show much less support compared to women. This may stem from the fact that in the justice system, those who receive the worst degree of unjust treatment are African American men. This discriminatory treatment can be seen in issues such as death sentencing and police brutality. When African American men are directly reminded of the justice system’s racial discrimination, they show much less support for capital punishment compared to African American women (Peffley & Hurwitz, 2007). This reveals the significant influence held by race in predicting attitudes, despite political discourse and depictions from the media over the previous four decades. The discrepancies that separated whites and African Americans in the 1970s are still apparent in the present day. There are other factors that
have also been studied to be influential in some manner, including political ideology and religious beliefs.

B. Factors that Influence the Public’s Opinion: Political Affiliation

Examining political ideologies, studies have also found that conservatism tends to have a positive correlation support for capital punishment (Barkan and Cohn, 1994; Kelley and Braithwaite, 1990). Concerning the two major political parties in the United States, polls have demonstrated that a substantial majority of Republicans are in favor of capital punishment, whereas the opposite is true for the Democratic Party. Jocelyn Kiley, who is the associate director for United States politics for Pew Research Center, stated “In 2018, a clear majority of Republicans — 77 percent — said they favored the death penalty, while 35 percent of Democrats said the supported capital punishment” (Santhanam, 2019). She emphasizes that the division among parties regarding the capital punishment debate is more extreme now compared to past history.

In the 1990s, advocacy for capital punishment continued to be a prominent matter for the Republican Party, as an unprecedented 80% of citizens voiced support in a poll issued by Gallup. The Party’s 1996 platform devoted more time to capital punishment than any other platform of the Republican Party’s entire history. In 2016, the Democratic and Libertarian Parties voiced support in favor of abolishing of the death penalty in the United States, instilling new planks to their platforms. The modifications of both parties’
platforms arose following two decades of the parties refraining from supporting capital punishment in the United States, particularly among the Democratic Party. Among the four prominent political parties in the United States (Democratic, Republican, Libertarian, and Green), the Republican Party is currently the sole party that does not hold an opposing position for capital punishment.

The Republican Party differentiates itself from the other parties because it explicitly expresses support for the continuation of capital punishment in the United States. The party’s platform in 2016 confirms the constitutionality of the death penalty and the importance of combating crime: “The constitutionality of the death penalty is firmly settled by its explicit mention in the Fifth Amendment. With the murder rate soaring in our great cities, we condemn the Supreme Court’s erosion of the right of the people to enact capital punishment in their states” (Republican Party Platform, 2016).

Despite the increased support by other political parties in abolishing capital punishment, the Republican Party’s advocacy of the death penalty is not astonishing, due to the Party’s reputation of supporting tough-on-crime policies (Moore, 2017).

The Republican Party has been divided on the capital punishment debate for most of the Party’s history. When there was growing popularity of the abolitionist movement at the end of the nineteenth century and beginning of the twentieth century, along with some states abolishing the death penalty, the battle attracted both proponents and opponents from both the Democratic and Republican Parties (Galliher et al., 1992). Following the
*Furman v. Georgia* ruling in 1972 that prohibited the death penalty nationwide, the Republican Party took its first stance on the capital punishment matter. The Court’s decision occurred during a time of increasing crime rates when Republican leaders, such as President Richard Nixon and Governor of California Ronald Reagan, were growing more vocal in their support for tough-on-crime policies. President Nixon abruptly criticized the Furman ruling and argued that opportunity still remained for states to reinstate the death penalty, which numerous states did indeed do in the following years. Attempts to reinstitute capital punishment were successful only because of the Supreme Court’s authorization of capital punishment in *Gregg v. Georgia*, just four years after the *Furman* decision.

Not long after the *Gregg* decision, in 1976 the Republican Party issued its first pro-death penalty plank in a platform, expressing that “each state should have the power to decide whether it wishes to impose the death penalty for certain crimes” (Republican Party Platform, 1976). This statement was followed over time with the Party supporting capital punishment with greater intensity. The Party platform demanded that capital punishment should be expanded to include “major drug trafficker” offenders (Republican Party Platform, 1988).

The concern for wrongful convictions ensued following the widespread support for capital punishment in the 1970s, 1980s, and 1990s, and it gained attention from the media and diminished the surging support for the death penalty (Baumgartner et al.,
2008). This progression, along with a decrease in crimes, fostered an atmosphere at the turn of the twenty-first century that was more amenable for capital punishment to be criticized by elected officials. Also notable was a conservative criminal justice reform movement that developed and supplied a language and logic for conservatives to favor alternatives to more severe sentences. Because these criminal justice reform organizations have attracted prominent conservative constituencies such as fiscal conservatives, evangelicals, and libertarians, they have successfully influenced how the Republican Party addresses crime. In some areas of the Republican platform, the language of the criminal justice policy has changed and is more subdued. The conservative criminal justice reform movement has instilled an environment that is much more approachable for Republicans to challenge the efficacy of long-established criminal justice policies. There are conservative and Republican leaders who now contend that capital punishment conflicts with their core beliefs and morals. The practice of capital punishment in the United States has routinely fallen flat when compared to the main conservative principles of fiscal responsibility, restricted government, and fostering a culture of life (Jones, 2018). The growing attention that these deficiencies have attracted has resulted in a modest downturn in support for capital punishment among Republicans for the past two decades, however there is still support of it by a sizable majority of the Party. Even though just a minority of Republicans have transitioned to now oppose the death penalty, it has become troublesome to disregard the opposition of capital punishment’s against
conservative values, due to esteemed conservative figures arguing for its abolishment. As the arguments are made to eradicate the death penalty by national conservative leaders, similar arguments are now also emerging in state policy debates. This advancement is extremely impactful for death penalty policy, as Republican state legislators have surfaced as advocates of legislation to render the death penalty invalid.

C. Factors that Influence the Public’s Opinion: Religion

There is currently no central agreement regarding the morality of the death penalty among religions and among the sects or denominations within each. A growing number of religious leaders, particularly those of the Jewish and Roman Catholic faith, have argued against the death penalty since the mid-20th century. All of the major Jewish movements in the United States either push for capital punishment’s abolishment or have urged for a temporary moratorium. The Reconstructionist, Conservative, and Reform movements all argue against capital punishment no matter the circumstance. The Catholic Church’s well established objection to capital punishment has led to negative attitudes of the death penalty from the Catholic faith. (Norrander, 2000). Pope John Paul II has denounced it as “cruel and unnecessary” and Pope Francis has been extremely vocal about his beliefs on the issue.

Most recently, in October 2014, Pope Francis alluded to the current Catechism in prompting for the abolishment of capital punishment, stating “It is impossible to imagine
that states today cannot make use of another means than capital punishment to defend peoples’ lives from an unjust aggressor” (DPIC, 2018). In September 2015, the Pope reiterated this declaration in a landmark speech before a joint session of the United States Congress, and in 2016, he prompted Catholic leaders globally to take the initiative to stop all executions. This pressure from the Pope in 2016 was largely a result of the Catholic Church’s “Holy Year of Mercy” that occurred during this year. On October 11, 2017, Pope Francis decreed capital punishment as “contrary to the Gospel” and “an inhumane measure that, regardless of how it is carried out, abases human dignity” (DPIC 2018). He held that capital punishment was “inadmissible” and that there are no circumstances in which it is acceptable, and that an individual convicted of a crime must have “a more adequate and coherent treatment” than the present form. The Pope attributed the death penalty as “an attack on the inviolability and the dignity of the person.” He also stated in this 2017 declaration that the Church doctrine is a “dynamic process that develops and grows” over the years, thus requiring the reaffirmation of the Catechism “that no matter how serious the crime that has been committed, the death penalty is inadmissible because it is an attack on the inviolability and the dignity of the person” (DPIC, 2018).

One year later, Pope Francis officially altered how capital punishment must be taught by the official Catholic Church in August 2018. He regarded the death penalty as “an attack on the inviolability and dignity of the person” and holds it to be “inadmissible” for every case. The Vatican’s announcement that the Catechism - Church’s official...
collection of teachings on a broad array of issues - would be modified to unequivocally oppose capital punishment occurred just two years ago. The Pope also pledged the Church to act “with determination” to abolish capital punishment throughout the entire globe. Before this alteration, the Catechism employed milder language when addressing capital punishment, permitting its usage “if this is the only possible way of effectively defending human lives against the unjust aggressor.” Pope Francis also indicated that “the cases in which the execution of the offender is an absolute necessity ‘are very rare, if not practically nonexistent.” Vatican observers state that there is no doubt surrounding the political objective of this recent revision. The Pope’s letter to Bishops associated with the change attempted to “give energy” to endeavors fighting “for the elimination of the death penalty where it is still in effect.”

John Thavis, author and Vatican expert, believes that this announcement from the Pope is the “the next logical step” in the development of formal objection to capital punishment by the Catholic faith. He believes, “This will be big deal for the future of the death penalty in the world. People who work with prisoners on death row will be thrilled, and I think this will become a banner social justice issue for the church.” The updated Catechism also presents a direct objection to Catholic politicians such as president of the Philippines Rodrigo Duterte, who has fought to reestablish the death penalty in his country, and also the governors of Texas and Nebraska in the United States, as capital punishment has been established as a fundamental principle of their policies. The
Catholic program director at the advocacy group Faith in Public Life holds, “There is no doubt the pope wants politicians to pay attention to this. He is not just speaking internally. The pope wants to elevate this as a definitive pro-life issue.” (Death Penalty Information Center, 2018).

Israel has outlawed sentencing the death penalty for all crimes except those against humanity and treason. Within the Christian faith, those who identify as Protestants are to some extent more likely to promote the death penalty compared to Catholics, and much more likely compared to non-religious individuals. Around 71% of Protestants endorse the death penalty compared to only 66% of Catholics and 57% of non-religious individuals.

The Islamic faith collectively accepts capital punishment, despite the religion’s principal themes of forgiveness and peace. Muslims view the death penalty as the most extreme punishment but accept it for crimes of the greatest severity. They believe that there may be a more severe punishment by God, although there can also be a punishment on Earth. Despite Islam remaining strongly a faith that supports the death penalty, there has been a modest but increasing view that opposes the punishment. On April 28, 2005, there was an argument for a moratorium on physical punishment, stoning, and capital punishment. The world’s dominant Islamic learning center, the Legal Research Commission of the Al-Azhar University in Cairo, ultimately denied this contention (BBC, 2009). Shifting to the Buddhist faith, because there are numerous forms and
organizations of Buddhism, there is no universal view on the death penalty from the religion. The death penalty certainly conflicts with Buddhist teaching — Buddhists greatly stress compassion for all lives and no violence. The First Precept commands that individuals must not harm or kill any living being. Buddhism believes in reincarnation and holds that administering capital punishment will implicate the souls of the chastiser and transgressor in subsequent incarnations. There are a number of heavily populated Buddhist countries that retain capital punishment, and even some that administer it, in spite of these Buddhist teachings (BBC, 2009). In Hinduism, there is not an official position on capital punishment for the religion. However, objecting violence, murder, and vengeance is consistent with the concept of ahimsa (non-violence) that was evident during Gandhi’s time. Hinduism’s principle of karma may reveal the reason why there is no compelling support or objection to capital punishment. Karma is the belief that if an individual commits a crime in this present life, he or she will suffer the consequences for it in a different life (BBC, 2009).

D. The Role of Perceived Fairness and the Media

In Supreme Court Justice Thurgood Marshall’s argument in *Furman v. Georgia* known as the “Marshall hypothesis” he proclaimed that even the most passionate advocates for capital punishment would “condemn death as a sanction” if they were cognizant that “capital punishment is imposed discriminatorily against certain identifiable
classes of people; there is evidence that innocent people have been executed before their innocence can be proved; and the death penalty wreaks havoc with our entire criminal justice system” (Furman v. Georgia, 1972: 364). Marshall recognized that the goal of justice and equality, with regard to appropriate and nondiscriminatory courses of action to protect those who are innocent, holds a prominent role in the attitudes that people hold toward the death penalty. A study that examined the role of fairness in the public’s attitudes toward capital punishment revealed that fairness is significant in a considerable way (Murray, 2005). The findings conclude that respondents in the study who believe that capital punishment is fairly administered are prone to support the practice with greater intensity. Also, the impact of fairness diminishes the impact of other factors that have been detected to strongly correlate with attitudes toward capital punishment, such as race and political ideology. This conforms with previous research concluding that there is a differentiation in perceptions of fairness among conservatives and liberals (Rasinski, 1987; Skitka and Tetlock, 1992).

Since the mid-1990s, media and news coverage of capital punishment have progressively highlighted unjust executions and exonerations. Preceding this era, the debate in the media coverage would often concern other problems of the practice, such as the cost or constitutionality. This altered coverage from the media, which has brought to light issues in the death penalty process, has prompted the American people to assess capital punishment with regard to fairness, in particular the possibility for innocent
individuals to be put on death row. Images of death row inmates leaving prison, embraced by their families and attorneys, have had a significant effect on the public’s opinion of capital punishment. American citizens are now aware that wrongful conviction is actually much more of a major issue than initially perceived.

Baumgartner, DeBoef, and Boystun discovered in 2008 that in addition to the decreasing murder rates in the United States, negative press of capital punishment lowered the public’s support for the practice (Baumgartner et al., 2008). In 1995, researchers Howells, Flanagan, and Hagan revealed that screening tapes of defendants’ executions resulted in diminished support for capital punishment. A study conducted in 2012 found that a negative depiction of capital punishment in films resulted in decreased endorsement of the death penalty among the audience. This study aligns with prior research conducted in 2010 which suggested that fictional television dramas are able to alter the public’s opinion of capital punishment. From these results, one may reasonably propose that movie dramas have the capacity to impact an audience’s political attitudes and affect their beliefs of not just the death penalty, but also for other highly debated political issues (Till & Vitouch, 2012).

E. Arguments in the Capital Punishment Debate

The argument for capital punishment that supporters of the death penalty commonly cite is the deterrence of potential murderers from committing a murder in
which innocent lives may potentially be saved. However, when supporters of the death penalty were questioned whether they would oppose the punishment if there was proof that it is not a superior deterrent, the majority disclosed that they would still support it because they believed that it is necessary for murderers to be executed. In the same way, when opponents of the death penalty were questioned whether they would support the punishment if there was proof that it was a superior deterrent, the majority responded that they would still oppose it because they believed that killing with the intention of retribution is immoral (Ellsworth & Gross, 1994). In the early 1950s, social scientists compared murder rates in both death penalty and abolition states. They examined the murder rates in all abolition states compared to the murder rates in death penalty states and the murder rates in a particular state prior to and following the state’s abolition. There was no evidence in either of these comparisons that a deterrent effect was a result of the death penalty. Two decades later, the debate grew when statistical methods adopted from econometrics claimed that every execution that occurred during the mid-century was correlated with eight or less murders. Careful examination revealed that this was not actually credible or repeatable. By the mid-1980s, social scientists were no longer interested in additional research of the deterrent effect. Currently, the recent research that has been conducted of the deterrent effect has concluded “Neither economists nor sociologists. Nor persons from any discipline (law, psychology, engineering, etc.) has
produced any indication that capital punishment deters capital murders - the crime of direct theoretical and policy concern” (Bedau, 2010).

Proponents of capital punishment claim that it is crucial so that the punishment will fit the crime of homicide. This argument can be reached due to the literal interpretation of *lex talionis*, also referred to as ‘an eye for an eye’ (Kant, 1999). The central idea is that crimes and punishments should be ordered according to their extremity, and one must ensure that the punishment’s extremity corresponds to the crime’s severity. Only for the most extreme crimes should the most extreme punishment be enacted, otherwise this proportionality is violated. If a defendant is guilty of an extreme crime, proportionality is also violated if the defendant is sentenced to a subsidiary punishment. Those in support of capital punishment state that the most appropriate punishment for murderers is for them to be killed because they killed another individual.

In response to the racial disproportionality of capital punishment, proponents argue that it is not the case that racial minorities are discriminated disproportionately. They assert that defendants executed are still guilty of a crime that warrants death, hence them getting executed is not unjust. Van Den Haag asserts: guilt is personal. If one murderer evades being executed due to arbitrariness, this does not alter all other murderers’ guilt, and this guilt results in their executions being just (Haag, 1978). In order to combat this dilemma, Haag argues that the number of executions should instead
become greater. He claims that because justice mandates that individuals should be given what they deserve, caucasian murderers should no longer be allowed to avoid execution. Essentially, if the injustice is that a group of criminals is given a punishment inferior to the punishment that they deserve, the solution to reinstitute justice and amend the administration of death penalty sentences is that the group at issue should be sentenced more to the death penalty. Opponents of the death penalty argue that a solution cannot be attained by sentencing more criminals to death, but rather obligates that the death penalty be eradicated in order to prevent anyone being unjustly executed due to racial discrimination.

Currently, the discrepancies and prejudices surrounding capital punishment have negatively impacted public support of the practice. The future of capital punishment remains questionable if more and more Americans become aware of the harsh reality of racial and social discrimination. It is apparent that standards of decency have evolved and resulted in growing opposition and dwindling support for the practice. If the Supreme Court gauges the standards of decency in this society in future court rulings — as it has in prior capital punishment cases — it is plausible to believe that lowered public support will result in the Supreme Court abolishing capital punishment.

The argument against capital punishment that has the greatest potency calls attention to how capital punishment is more costly in comparison to the alternate form of punishment that is long-term or lifetime imprisonment. This argument was nonexistent
prior to 1976, but has recently surfaced in debates regarding capital punishment in the current era of the United States today (Steiker, 2010). The argument has emerged to become so universal in present-day debates that it is difficult to comprehend that it was essentially non-existent until recent decades. It has possibly even become the preeminent threat to the enduring practice of capital punishment in the United States. So exactly why is capital punishment so expensive? There are a multiple of factors that contribute to the practice’s higher cost compared to other forms of punishment. One reason concerns the legal costs: almost all individuals who are faced with the death sentence are not able to compensate for their own attorney. For this reason, the state must provide them with court-appointed attorneys, and pay for these additional prosecution costs. Pre-trial costs are also impactful; capital cases are significantly more complex than non-capital cases and take longer to get to the actual trial. Concerning the jury selection, it is significantly more costly and time consuming because jurors are questioned extensively on their views of the death penalty. At the trial stage, capital punishment trials can potentially be four times as long as non-capital trials. This results in additional attorney and juror compensation that is stacked on top of court personnel and additional accompanying fees. The majority of death rows include solitary confinement that further exacerbates the cost of the death penalty process. Because the death row prisoners are in solitary confinement for 23 hours a day, additional security and accommodations are required. Lastly, all defendants are granted a series of appeals in order to lessen mistakes. These appeals are
imperative because there have been some defendants proven innocent by newly discovered evidence just hours prior to their executions. Taxpayers are those who bear these additional costs at the appeals stage of capital punishment.

Another argument in opposition to capital punishment holds that prolonged death row confinement is unconstitutionally cruel. This issue emerged in the capital punishment debate in the early 2000s. The discourse increased when Connecticut inmate Michael Ross was executed in 2005 after being on death row for 17 years. This claim uncovers some of the predominant shortcomings of the current capital system. The unprecedented amount of time between a defendant’s sentencing and execution, as well as the progressively severe conditions of death row, have sparked another formidable concern regarding capital punishment in America. Today, the time span between sentencing and execution is frequently measured in decades instead of weeks, months, or years. Around 50% of all death row exonerations have taken over a decade, and this time span between sentencing and execution continues to lengthen. Some prisoners have even been on death row for over 20 years. Also, the conditions of death row have continued to progressively deteriorate over the past four decades (Steiker, 2010). A defendant is often in solitary confinement for up to 23 hours a day, and many states do not permit those on death row to engage in group recreation or have direct visits with family and friends. Also, the frequently meaningless proclamations of capital punishment sentences has sparked a new, victim-aimed attack on capital punishment stressing the ineptitude of the American
capital system to bestow meaningful compensation for the families of victims. This presents the question of whether defendants on death row are being inflicted with two different punishments: the execution itself, as well as the many years residing in conditions equivalent to solitary confinement. This newly established concern by opponents of the death penalty could possibly spark notable constitutional implications.

The primary objection to the argument that the punishment for a crime should be proportional to the crime is that it cannot be generalized - or can only be generalized with extreme results. For crimes of torture and rape, the convicted offender could be tortured and raped, but the actual thought of doing so is morally vile. Opponents of capital punishment take issue with the principle of *lex talionis*, stating that at times the principle would bring forth a punishment that does not correspond with the crime. For instance, if someone was kidnapped for one week, if *lex talionis* was applied, the person guilty of kidnapping should be sentenced to jail for only one week. Also, it is implausible for crimes such as multiple homicide or mass murder to result in an equivalent punishment. They also claim that the proportionality principle does not directly strengthen the assertion that capital punishment is mandatory. Despite the principle mandating that the most extreme punishment is restrained to what we label as the most extreme forms of crime, it does not delegate what the most extreme punishment will be. For this reason, opponents believe that it is completely in accordance with murderers to receive the punishment of life in prison without the possibility of parole, if there is rationale to
believe that life in prison without the possibility of parole is the utmost punishment that is morally admissible.

Abolitionists also voice institutional concerns for the administration of capital punishment in regards to the variability and inconsistency of determining who lives and who dies. Even proponents of capital punishment acknowledge that in some manner there is indeed arbitrariness in concluding which criminals should be sentenced to the death penalty. The term arbitrary has two connotations: death sentences are affected by legally extraneous factors, or death sentences are appointed randomly. The first definition is demonstrated by the president of the Southern Center for Human Rights Stephen Bright, who accounts “A member of the Georgia Board of Pardons and Paroles has said that if the files of 100 cases punished by death and 100 punished by life were shuffled, it would be impossible to sort them out by sentence based upon information in the files about the crime and the offender” (Phillips, 2009). In other words, being knowledgeable of the legal facts in a capital case does not adequately predict whether a defendant will be sentenced to die — social factors are crucial as well. A study conducted in 2009 found that the likelihood of a death sentence was 20 times greater for cases that have the greatest number of aggravating social facts. This presents compelling evidence that in the most active death jurisdiction of the United States, capital punishment is sentenced arbitrarily. Both proponents and opponents of capital punishment must also be cognizant
that the susceptibility and unreliability results in rulings that are wrongful, and that there
need to be measures in order to combat this major dilemma.

Opponents of capital punishment argue that it is an irreversible punishment, for
the reason that once it has been administered there is zero probability of correcting this
decision if it is subsequently discovered that the defendant was innocent. Contrarily, other
forms of punishment are reversible, with the exception of time lost for the imprisonment
of an innocent individual. There is differentiation among the punishments of the death
penalty and imprisonment, however. A person can be freed if he or she was serving a life
sentence for murder and after was discovered to be innocent, as the sentence can end at
any point. The person is afforded the ability of not suffering the complete suffering
deriving from his or her sentence. The same cannot be said to be attainable for a person
sentenced to death and executed, because this form of punishment cannot be administered
to a certain degree. Also, even though someone who is wrongly accused of a crime and
has spent time for the crime imprisoned cannot receive this time back, the person could
possibly receive some form of redress.

The powerful argument that the death penalty disserves the loved ones and
families of victims has recently gained heavy attraction. For many years, the argument
made by those in support of the death penalty was that the punishment alleviated the pain
experienced by the victim’s family remained generally unanswered and uncontested.
However, throughout the past several decades, many critics of the death penalty have
called attention to the exasperation and pain experienced by the victims’ families due to the prolonged delay between the trial and actual execution. A former Oregon district attorney and critic of capital punishment encompasses this argument in a recent article: “Let me say that my compunctions primarily are not on moral or ethical grounds involving putting a convicted murderer to death, but on the way it is used (or not used) in this state, and the enormous expense in dollars and emotional capital for the families of homicide victims” (Steiker, 2010). Also, in California the father of a murdered victim recently agreed with the decision from the district attorney to accept a non-death plea due to the probable duration of appeals. He expressed “while our unequivocal first choice is the death penalty, we acknowledge that in California that penalty has become an empty promise.” The district attorney stated that she decided to accept the plea because she was driven to spare the agony that the victims’ families would suffer for years from a post-trial review. Additionally, Kathleen Garcia, a member of New Jersey’s Death Penalty Study Commission who had a family member fall victim to murder, allocated her support against the death penalty because of the hardship of the victims’ families from the delays in the capital system. She asserted in an editorial “Make no mistake - I am a conservative, a victims’ advocate and a death penalty supporter. But my real life experience has taught me that as long as the death penalty is on the books in any form, it will continue to harm survivors. For that reason alone, it must be ended” (The Telegraph, 2010).
Another well-established argument against the death penalty concerns the liberal principle of state interference. This principle states that society shall not use the government to interfere vigorously with people’s lives except to seek a goal of preeminent social importance and then only by minimal destructive, invasive, and restrictive measures. This principle parallels the principle of substantive due process in constitutional law. Abolitionists assert that decreasing violent crime is a goal of preeminent social importance. There are also two elements used by opponents that concern this principle’s relation to capital punishment: they state that life imprisonment is (a) a sufficient means to that end; and (b) a less restrictive, coercive means to that end (“Morality, Politics, and Policy,” 2021).

The capital punishment debate is consumed with passionate but complicated arguments. Many people do not even agree with the basic logic of the death penalty, and this is key to its future abolition. How can capital punishment continue to exist in our nation’s criminal justice system with all of these discrepancies in the arguments? The answer is it cannot. There appears to be no feasible future for an issue that has so hotly debated for centuries.
Chapter V: Decline of Capital Punishment

Since the 1970s, there have been over 8,500 individuals sentenced to the death penalty in this nation. The death penalty in the United States has declined dramatically in the last 15 years. Currently, fewer death sentences have been instituted by the criminal justice system in America than on any occasion in the past three decades. Compared to the 1990s when capital punishment was sentenced to several hundred people, in 2016, capital punishment was sentenced to only 31 people (Garrett et al., 2017). Also, support for capital punishment from Americans decreased by around 20% from the 1990s to 2016.

Examining the rate of capital punishment being instituted, this dramatic drop is even more apparent at the local level. In the 28 death penalty states, death penalty sentences come from only a handful of counties. In states that have the largest capital punishment sentences, these sentences are also imposed from a dwindling number of individual counties, such as in Duval County, Florida, and Riverside County, California. The decrease in capital punishment executions is still more prominent than the decline in capital punishment sentences. From 1977 to 2015, only 1,400 defendants were executed out of the over 8,000 capital punishment sentences. Baumgartner concluded that 2% of counties in the United States were accountable for most of the executions, and 85% of counties had not performed a single execution in the past 45 years (Baumgartner et al., 2008). It must be noted that executions frequently occur fifteen or more years following
the death penalty’s sentencing to an offender. For this reason, the number of executions that occur each year in the United States does not inevitably translate the present public opinion regarding the punishment. It is also challenging to detect public opinion regarding capital punishment from the amount of death punishments that are sentenced. Death sentences differ substantially between states, and are also frequently congregated in certain counties with a state. Counties that contain the greatest number of homicides do not generate the greatest number of death sentences at all times. For instance, since 2000 the number of death sentences in the United States has plunged despite the continual stability of the country’s murder rate. Nonetheless, it is significant that the number of death sentences each year in the United States has decreased by more than 80 percent throughout the last 25 years.

In the first half of 2020, new death sentences and executions were at never before seen lows, according to the 2020 Mid-Year Review issued by Death Penalty Information Center. Both the coronavirus pandemic and the continuous decline in the death penalty nationwide were the causes of these extremely low numbers. However, prior to the coronavirus pandemic, the United States was on track for its sixth consecutive year with 50 or fewer additional sentences for the death penalty and 30 or fewer executions. By the middle of 2020, there were only 13 new death sentences in seven states, and only five states - notable death penalty states - executed six individuals. It must also be noted that during this time, Walter Ogrod and Paul Browning, two innocent men convicted and
sentenced to the death penalty, became the 168th and 169th exonerations in the United States since 1973. Despite these two victories, it had been over 20 years since the two men were initially convicted and sentenced.

A number of new death sentences were imposed in Texas, Florida, and California, however multiple executions occurred in only one state: Texas (DPIC, 2020). An alarming reality remained an issue for these six executions. All six men that were executed in the first half of 2020 suffered from mental illness, extreme childhood abuse or trauma, and/or brain damage or low IQ. There have also been inefficient legal representation, procedural miscues, shortened legal procedure, objection by the families of victims, and declarations of innocence.

In Texas, John Gardner was put to death following the Supreme Court’s denial to consider an allegation of inefficient aid of counsel. Abel Ochoa was the second individual executed in Texas despite seeking a stay of execution arguing that in his case, the state unconstitutionally intervened in the clemency proceedings because the state stopped him from presenting evidence that strengthened his clemency application. In Georgia, Donnie Lance was executed by the state despite the clemency pleas of the children of Lance and his ex-wife, the victim. Lance did not waver in contending that he was not guilty in his ex-wife’s and her boyfriend’s homicides, however he was the third straight offender in Georgia that was executed following a rejection of possible exonerating DNA testing. Nicholas Sutton was also executed by the state of Tennessee in the first half of 2020.
Sutton’s execution occurred in spite of support for his clemency petition from multiple members of the victims’ families, five jurors who imposed his death sentence, and numerous corrections officers who attested to his rehabilitation and also disclosed stories of occasions in which Sutton had risked his own safety for the safety of the officers (DPIC, 2020).

Additionally, the execution of Nathaniel Woods in Alabama drew significant attention throughout the nation. The widespread news articles shared every single time one logged into social media brought awareness to Woods’ case and sparked impassioned cries from the public. Woods was sentenced to death by a non-unanimous jury and executed in spite of prosecutors admitting that the other defendant in the case was the shooter in the crime. His sentencing was stained with claims of racism, police misconduct, upsetting and unnerving witnesses, and insufficient counsel. Lastly, in Missouri, Walter Barton became the first individual to be executed during the coronavirus pandemic. Barton’s defense team acquired affidavits from three jurors that irrefutable new specialized examination refuting the substandard science used to convict him would have caused them to re-examine their votes during trial (DPIC, 2020).

In June 2020, the American Bar Association’s Criminal Justice Section published The State of Criminal Justice 2020, which reports trends, issues, and notable changes that transpired in the criminal justice system in the United States in 2019-2020. The report also contains a chapter written by Ronald J. Tabak on noteworthy capital punishment
progressions in this period, who is the chair of the Death Penalty Committee of the ABA’s Section of Civil Rights and Social Justice. Tabak’s investigation emphasizes the long lasting continuous trend in death sentences and executions. He contends that economic, geographic, and racial factors are responsible for capital punishment’s arbitrary administration, and diminished public support is responsible for its usage. He details, “2019 was the fifth straight year with fewer than 30 executions” and less than fifty new death sentences. He mentions that there are a handful of jurisdictions who continue to administer the punishment, as capital punishment remains as a punishment for certain geographical locations. Tabak discloses, “Just seven states accounted for all of the country’s executions” (Wojcik et al., 2020). Also, of the additional 34 death sentences that were enforced, half occurred in only three states and less than 1% of counties were responsible for these new sentences across the United States.

Tabak states that the decrease in the number of death sentences did not coincide with development in reducing systemic injustice. Despite the number of executions reaching the lowest point in three decades and the number death sentences remaining the lowest in 40 years for the nation in 2019, Tabak detects that “there are significant questions about the guilt of a growing percentage of the death row prisoners who are executed or whose execution dates are in the near future.” He believes that the downturn in new death sentences is partly due to the growing number of states that have outlawed the punishment or issued moratoriums on executions. In 2019, Colorado and New
Hampshire abolished capital punishment, California (the largest death row state in the United States) issued a moratorium, and Ohio imposed a de facto moratorium. Most recently, Virginia abolished capital punishment on March 24, 2021 (Evans, 2021). Despite the decline in death sentences, Tabak states that multiple critical issues surrounding capital punishment continue to exist. For instance, the continuous execution of offenders who have histories with serious mental illnesses, the employment of forensic evidence that is deficient in scientific validity, death sentences occurring due to inefficient legal counsel or from courts authorizing contentious waivers of the right to counsel, and the development of procedural ‘traps’ that inhibit courts from reviewing issues and permitting relief despite discovering legitimate constitutional miscues. In Tabak’s report, he references a recent Tennessee study that detected “the best predictors of whether the death sentence would be imposed did not include the facts of the crime, but instead were arbitrary factors such as where the murder occurred, the race of the defendant, the quality of the defense, and the views of the prosecutors and judges working on the case” (Wojcik et al., 2020).

Regarding the growing opposition of the American public for the death penalty, Tabak proposes that many factors may be responsible for this trend (Wojcik et al., 2020). The public has increasingly become informed about the relationship between lynching, racial terrorism, and capital punishment, and also about the unfortunate reality of many innocent individuals being sentenced to death and executed. The rising conservative
activism opposing the death penalty and recent movies, books, and documentaries have also played a role in shaping the public’s opinion of capital punishment.

Tabak’s chapter in The State of Criminal Justice 2020 concludes with his analysis of capital punishment’s future in the United States. He contends that capital punishment in this country can be warranted “only if one believes in arbitrarily and capriciously applied, highly erratic vengeance” and states, “Ultimately, our society must decide whether to continue with a penalty implemented in ways that cannot survive any serious cost/benefit analysis.” Tabak’s prediction of the future of capital punishment in the United States provides additional support for the overall argument that this research has intended to establish. Tabak states, “As more and more people recognize that capital punishment in this country is inconsistent with both conservative and liberal principles, and with common sense, the opportunity for its abolition throughout the United States will arrive.” Tabak’s claim aligns with the objectives this research aimed to achieve: investigating the various factors that have contributed to the shift in the moral standards held by Americans following the reinstatement of capital punishment, and the impact these standards may have on the future of capital punishment. Tabak holds, “Those who already realize that our actual death penalty is like ‘the emperor’s new clothes’ should do everything with a reasonable chance of accelerating its demise” (Wojcik et al., 2020).
Chapter VI: The Future of Capital Punishment

Support for capital punishment in America is currently at its lowest level since it was reinstated in 1976. It appears that more and more Americans are acknowledging that there are more ways to ensure that an offender is never released back into society. Americans in many counties and states recognize that in addition to the harsh, arbitrary, and costly nature of capital punishment, the punishment does not align with their values. Experts concur that the diminished administration of capital punishment and public opinion will likely result in more states abolishing the practice. In September and October 2020, Americans were asked in a Gallup poll “Are you in favor of the death penalty for a person convicted of murder?” The most recent poll revealed that 55% were in favor of it and 43% were not in favor of it. When the death penalty peaked in 1994, 80% of Americans supported the punishment. Professor at Cornell School of Law and assistant director at the Cornell Death Penalty Project Sheri Lynn Johnson predicts, “At some point, there will be so little support for the death penalty that it will be abolished” (Aratani, 2018). She believes that objection to racial discrimination in mass incarceration and the American criminal justice system will ignite support to abolish capital punishment.

According to experts, there has been minimal effort from both Democrats and Republicans in advocating for stricter death penalty laws. The two major parties concur that the method of punishment is costly and precarious due how difficult it is to ensure a
defendant’s guilt, as well as the controversial methods of execution, according to the director of the ACLU’s Capital Punishment Project Cassandra Stubbs. Stubbs states, “We’ve seen as a nation that it has enormous problems. We’ve seen that it fails to protect the innocent… I think the public accepts and understands that we cannot ensure that the death penalty won’t be used to execute an innocent person”’ (Aratani, 2018). Twenty years ago, the majority of politicians from both the Republican and Democratic parties supported capital punishment in the United States. However, in the present day criticism of it has increasingly become bipartisan. There has always been an inclination of hesitation exuded from the Democrats, but now a greater number of conservatives view capital punishment as another unsuccessful government program. Hannah Cox, the national manager for Conservatives Concerned About the Death Penalty, states “When you look at how much money we’re spending, no one looks at that and thinks the death penalty works fine… we’re seeing a real escalation as far as the number of Republican legislators who are sponsoring repeal bills” (Greenblatt, 2019).

In 1992, Bill Clinton flew to Arkansas during his campaign for president to witness the execution of Ricky Ray Rector, a man with such severe brain damage that he stated he was saving some of his last meal “for later.” Douglas Berman, law professor at Ohio State University, expresses “Democrats were still supportive of the death penalty… they certainly believed it would be a political killer not to be vocal in saying that, at least in some cases, the death penalty would be appropriate.” During the early 1990s violent
crime rates surged, and both of the parties championed the tough-on-crime response. This resulted in the 1994 federal crime law, which added a number of federal crimes eligible for the death penalty. The drastic national downturn in violent crime and homicides throughout this generation has afforded politicians other options besides aiming for the maximum possible sentence every time. Re-evaluating the death penalty has transformed into a bipartisan project. Hannah Cox states, “There’s a natural alliance with Democrats… there are not a lot of issues where the two sides are coming together.”

Support for capital punishment in America has decreased due to concerns regarding cost and innocence. Among the death sentences that have been issued, DNA evidence has exonerated over 160 defendants on death row. For every nine executions that occur, one individual is exonerated. Daniel LaChance, historian at Emory University who examines this particular problem, states “It’s well-known that it’s more expensive to put people to death than to keep them in prison for the rest of their lives. It all adds up to a really expensive big-government program. There has been a sense, particularly in places that use the death penalty infrequently but have big death rows, of what is this all for?” With over 700 prisoners, the largest death row in the United States resides in the state of California, however, the last execution in the state was on January 17, 2006. Wyoming has not executed anyone in over 25 years, and 1939 was the last execution that occurred in New Hampshire. Law professor at Duke University Brandon Garrett holds “If
you have a sentence on the books, you want it used, and it’s not being used… the only point of the death penalty is to execute people quickly or it does seem arbitrary.”

Politicians and Supreme Court justices show exasperation and even anger regarding the lengthy process of capital punishment. Former candidate for Attorney General of Mississippi states “We need to accelerate the process as much as we can… stories abound of inmates on death row and they’re just not moving.” More and more politicians are now questioning whether it is worth the cost to uphold capital punishment.

Chad McCoy, the current Kentucky House Republican whip and opponent of the death sentence, asserts “When you talk about death penalty, a lot of people immediately want to have a criminal justice angle on it or a morality angle… mine is purely economics.”

In addition to lawmakers, prosecutors have also become increasingly hesitant about the death penalty. In many large counties the past few years, citizens are voting progressive prosecutors who are resistant against seeking execution as the form of punishment. In 2018, there was not a single county in the United States that sentenced death for more than two defendants. This is a vast comparison to the mid-1990s, in which over 300 death sentences were issued for three consecutive years. In 2018, there were 42 death sentences issued, and there have not been more than 100 death sentences since 2010. In addition to the diminishing number of places that still impose the death sentence, there has been a decline as well in these places. Previously, Florida and Texas carried out over 40 death sentences each year, however this number has dropped to less than 10.
The future of capital punishment in the United States is now contingent upon President Joe Biden’s actions. Over 40 members of Congress and members-elect petitioned for President Biden to issue an executive order that abolishes the federal death penalty on his first day as president. Numerous Democratic lawmakers voiced “With a stroke of your pen, you can stop all federal executions, prohibit United States Attorneys from seeking the death penalty, dismantle death row at FCC Terre Haute, and call for the resentencing of people who are currently sentenced to death.” During Biden’s campaign for president, he advocated for a moratorium on capital punishment and advocated for life sentences without parole or probation. Lawmakers in the Democratic Party wrote about the “unjust, racist, and defective” nature of capital punishment and the discernible discrepancies in its administration. According to the NAACP, despite African Americans accounting for just 13 percent of the United States’ population, they account for 42 percent of defendants on death row and 35 percent of defendants who are executed.

Biden ultimately did not tackle the issue during the start of his presidency, but on January 19, Ron Klain, White House Chief of Staff, wrote a memo stating that President Biden would issue several criminal justice executive orders between January 25 to February 1. This memo included “action to begin fulfilling campaign promises related to reforming our criminal justice system.” During Biden’s presidency, he holds the power to sign a blanket executive order mitigating the federal death row sentences of all 49
individuals on death row to life without parole instead. He could also issue a moratorium for all federal executions through an executive order, comparable to the executive order issued in 2019 by the governor of California Gavin Newsom that suspended executions in California. Despite this order not extending once Biden’s presidency is over, executive director of the Death Penalty Information Center asserts that it could act as “an admission about how broken the system is.” Similar to the governor of California, Biden could additionally terminate the government’s execution protocol and dismount the execution chamber where the executions occur.

Shifting attention now to the powers of Congress, it can formally put an end to the federal death penalty by a single act of legislation. There have been a number of notable Democrats who have presented bills intending to accomplish this: Representatives Adriano Espaillat and Pressley did so in January 2021 when they introduced a bill to abolish the federal death penalty. Additionally, the incoming Senate Judiciary Chair Dick Durbin has reported that he intends to establish a companion bill in the Senate to accompany Pressley’s bill. This legislation would eradicate the death penalty federally and order that defendants on death row must be re-sentenced. Because the United States Senate is now controlled by the Democratic Party, the probability of the legislation becoming law has increased, but continues to be rather fluid. Austin Sarat, who serves as a professor of law and politics at Amherst College, holds “I don’t think a federal definitely abolition bill is going to get through the Senate of the United States.” This
prediction is based on his belief that there is a low probability that the present
composition of Congress will issue the 60 votes required to countermand the Senate
filibuster and send the bill to President Biden. However, Sarat still values how important
the bills are because they “further signify… increasing doubts about the death penalty in
the United States.”

Lawmakers could also alter the federal death penalty statute by removing a
number of federal crimes that are currently eligible for the death sentence. Sarat also
believes that lawmakers have the power to alter the appellate process in federal capital
cases, which contains less constitutional protections compared to those appealed by
states. In a similar manner, Congress could also issue legislation that orders for stays of
executions to be granted for cases in which there are problems of disputed fact or law, “so
that the United States Supreme Court cannot allow an execution to go forward when there
are doubts about its legality.” During former President Trump’s final months in office,
lower courts permitted stays to a number of handful cases - such as those of Brandon
Bernard and Lisa Montgomery - in order for there to be time for legal hearings. However,
the Supreme Court ultimately overruled these stays (Carlisle, 2021).

Examining the future of capital punishment, perhaps the most telling factor for the
future of capital punishment globally is the international human rights law. In 1966, the
General Assembly of the United Nations established the International Covenant on Civil
and Political Rights. It established that “no one shall be subjected to torture or to cruel,
inhumane or degrading punishment or torture” (“Morality, Politics, and Policy,” 2021). It was apparent that this language conflicted with the administration of the death penalty. The United States ratified the International Covenant on Civil and Political Rights and excluded two provisions: the prohibition against executing pregnant women and juveniles. Two decades later, in 1989 the General Assembly established the Second Optional Protocol to the Covenant, declaring that “No one within the jurisdiction of a State party to the present Optional Protocol shall be executed.” The Organization of American States simultaneously then established a Protocol to the American Convention on Human Rights to Abolish the Death Penalty. Signatory nations continue to face difficulty deciphering and imposing these protocols, and the United States is certainly not the only country searching for ways to discount their mandate. Nonetheless, these developments, which coincide with the condition allocated to countries seeking to join the Council of Europe that they outlaw capital punishment, suggest that the future of capital punishment globally may soon cease to exist.
Prior to Trump assuming office, only three executions administered by the United States federal or national government had occurred since 1988, which was the year of the federal death penalty reinstatement. Since 2003, federal executions were halted for 17 years due to concerns over the drugs administered during executions, however former President Trump ordered for federal executions to resume in 2020 (Honderich, 2021). Five executions occurred in Trump’s final few months in office. In 2020, there were 10 offenders executed, more than tripling the number of federal executions in the preceding 42 years. As president, Donald Trump oversaw the greatest number of executions by a United States president in over a century, overseeing the executions of 13 offenders on death row offenders since July 2020. These executions are at odds with a 130 year old precedent of suspending executions during a presidential transition.

President Joe Biden, who assumed office on January 20, 2021, campaigned in favor of abolishing federal executions while president. Mr. Biden was a passionate proponent of capital punishment for several decades during his time as a Delaware senator. In 1994, around 60 federal crimes were added to Joe Biden’s crime bill which detailed the class of offenders who could be executed. There are some offenders who remain convicted today, as the convictions were contingent on the laws of Biden’s 1994 legislation. Vice President Kamala Harris has also remained critical of the capital punishment process. During her campaign for San Francisco District Attorney in 2003,
she affirmed this opposition and did not attempt to ensue the death sentence in the homicide of a 29-year-old police officer who was murdered while on duty

State prisons in America have continued executing offenders sentenced to the death penalty, as 22 offenders on death row were executed in 2019. However, despite the rise in the number of federal executions carried out under former President Trump, executions from state governments have declined. States have increasingly transitioned to abolishing capital punishment entirely, and most have either legally prohibited it or have not executed any prisoners in over a decade.
Conclusion

Of the many passionately-debated topics that consume America today, capital punishment may reign supreme. One can not deny the decline of capital punishment both globally and nationally. Fewer countries and states are permitting capital punishment today compared to centuries, decades, and even years ago. Human rights continues to be a priority for many areas of the world. Some of the world’s most esteemed leaders and American allies urge the United States to join this consensus of abolishing the death penalty. Nationally, a growing number of states are abolishing the death penalty, with the most recent being Virginia in March 2021. Also, the number of death sentences and executions have been steadily declining since the end of the 1990s. For many states and also the majority of the public, capital punishment no longer is an integral component of the American criminal justice system. Even in states widely acknowledged as death penalty states, death sentences have decreased.

In a democracy, the content of the laws is decided by the people. In general, public opinion has been favorable toward capital punishment, however this support has diminished notably since the 1990s. The disparities and flaws within America’s capital punishment system have contributed to this altered public opinion. Capital punishment is expensive, disproportionately attacks people of color and low income, innocent humans are being executed, and it is not a deterrence against crime. The capital punishment debate is not the same compared to years past. Opponents of capital punishment now
have stronger arguments against the punishment because these discrepancies are being brought to light. The United States continues to evolve its morals and values, just as it has done so since the nation’s establishment. We once believed that owning another human being was morally acceptable. We once believed that separating and degrading individuals based on the color of their skin was morally acceptable as well. We once believed that executing people as punishment for their wrongdoings was morally acceptable. However this now appears to not be the case.

In order for the Supreme Court to abolish capital punishment, a majority of the justices must firmly believe that standards of decency have shifted to the extent that the death penalty for adults is cruel and unusual punishment and barred by the Eighth Amendment. Because a standard of decency is intrinsically ignited by values, as more people continue to be exposed of the truth about capital punishment, the increasing numbers will establish that it has no function. The future of capital punishment is contingent upon one major factor: whether it is receiving public support. The many disturbing facts about capital punishment have resulted in a significant downturn in its administration and lowered support from Americans. This shift in public opinion holds significant weight on whether juries sentence the death penalty and how elected lawmakers vote on legislation to restrict or outlaw capital punishment. Juries deciding not to sentence the death penalty may signal to the Supreme Court that society is maturing and people are increasingly no longer believing that execution is advantageous in any
manner. Also, when states make the decision against executing an offender, this conveys their uneasiness about executing people. When states abolish the death penalty, they are demonstrating that it is not an appropriate form of punishment anymore. This provides more evidence of the evolving standards of decency.

The day when capital punishment is abolished in the United States may not be as far as we once thought. With each ruling, the United States Supreme Court inches the American people closer and closer to a criminal justice system in which capital punishment is no longer suitable. Predicting the future is always a risky endeavor. However, the research established in this study provides valid evidence to suspect that the narrative of capital punishment in America might be nearing its last chapter.
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