

MORE INDICATORS OF THE FALLING SUPPORT FOR THE DEATH PENALTY

TALIA ROITBERG HARMON* & MICHAEL L. RADELET**

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INTRODUCTION

In the seminal *Furman v. Georgia* case from 1972, the U.S. Supreme Court (in effect) invalidated all death penalty statutes then in force in American jurisdictions.¹ After many states went back to their legislative drawing boards, some of the revised statutes were approved by the Court in 1976.² At that time, Gallup found that 66 percent of the American public supported the death penalty, while 26 percent stood opposed.³ While support grew to 80 percent in 1994,⁴ a recent Gallup Poll from October 2022 shows that this figure has dropped to 55 percent.⁵ Recently, only 36 percent of Americans still support the death penalty given the alternative punishment of life imprisonment.⁶

* Professor and Chair, Department of Criminology & Criminal Justice, Niagara University.

** Professor Emeritus, Institute of Behavioral Science, University of Colorado-Boulder.

1. *Furman v. Georgia*, 408 U.S. 238 (1972).

2. *See* *Gregg v. Georgia*, 428 U.S. 153, 179 (1976) and companion cases.

3. *Death Penalty*, GALLUP, <https://news.gallup.com/poll/1606/death-penalty.aspx> (last visited Mar. 1, 2023).

4. *Id.*

5. *Id.*

6. *Id.* Gallup last asked this question in 2019. In every American jurisdiction that authorizes the death penalty except Alaska, those convicted of capital homicides

Since the 1970s, the number of executions and death sentences in the United States (U.S.) has declined precipitously, and they are increasingly confined to fewer states. As the Death Penalty Information Center reports, 2022 was the “eighth consecutive year with fewer than 30 executions and 50 new death sentences.”⁷

The step away from the death penalty in the U.S. is only part of a worldwide movement that is gradually moving toward the abolition of capital punishment. According to Amnesty International, in 1977, “only 16 countries had totally abolished the death penalty. Today, that number has risen to 108 – more than half the world’s countries. More than two-thirds are abolitionist in law or practice.”⁸ In September 2022, Equatorial Guinea became the twenty-fifth African country to eliminate the death penalty.⁹ In the U.S., thirteen states have abolished the death penalty since 1972.¹⁰

While many factors might explain this trend, this Article focuses on post-*Furman* changes in the ways that the death penalty is justified by its supporters. Instead of focusing on *empirical* issues (things for which data can be collected and analyzed, such as deterrence), we contend that today’s proponents tend to focus on abstract moral principles that are more difficult to prove or disprove with empirical data

but not sentenced to death are sentenced to life imprisonment without any hope for parole (LWOP). Thus, only about 1/3 of the American public supports the death penalty today given the existing alternatives.

7. *The Death Penalty in 2022: Year End Report*, DEATH PENALTY INFO. CTR., <https://reports.deathpenaltyinfo.org/year-end/Year-End-Report-2022.pdf>.

8. *What We Do*, AMNESTY INT’L, <https://www.amnesty.org/en/what-we-do/death-penalty/> (last visited Mar. 1, 2023).

9. *Equatorial Guinea Becomes 25th African Country to Abolish Death Penalty*, DEATH PENALTY INFO. CTR. (Sept. 20, 2022), <https://deathpenaltyinfo.org/news/equatorial-guinea-becomes-25th-african-country-to-abolish-death-penalty>.

10. Massachusetts (1984), New York (2004), New Jersey (2007), New Mexico (2009), Illinois (2011), Connecticut (2012), Maryland (2013), Delaware (2016), Washington (2018), New Hampshire (2019), Colorado (2020), and Virginia (2021). The Nebraska legislature abolished the death penalty in 2015 and overrode the governor’s veto of that Bill in 2016; however, it was reinstated by a ballot initiative in 2016. *State by State*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state> (last visited Mar. 1, 2023). Four other jurisdictions currently have moratoria on executions (California, Oregon, Pennsylvania, and the federal government). *Death Penalty States with Gubernatorial Moratoria*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state> (last visited Mar. 1, 2023).

(e.g., proponents may argue that “justice demands it” or “they deserve it”). In fact, as we will argue below, almost all the empirical claims used to support capital punishment in the 1970s have been discredited by legal scholars and criminologists. We address these claims in no particular order.

I. ARGUMENT

Deterrence. Our understanding of public opinion is that until the past two decades or so, the principal argument in support of the death penalty was deterrence; meaning, we need to execute offenders to send a message to *potential* offenders who contemplate committing similar heinous crimes. Scores of researchers have examined this issue, and the strong consensus among the nation’s top criminologists is that the evidence does not support the contention that the death penalty exerts stronger deterrent effects than long prison sentences.¹¹ The few studies that have reached a different conclusion have been largely discredited.¹²

Perhaps the final word on this debate was published by a 2012 National Academy of Sciences panel comprised of the world’s leading criminologists and capital punishment scholars.¹³ This 123-page report reviewed different methodologies and studies that have been employed to study deterrence, delineating the limits and challenges of each approach. They concluded:

The committee concludes that research to date on the effect of capital punishment on homicide is *not informative* about whether capital punishment decreases, increases, or has no effect on homicide rates. Therefore, the committee recommends that these studies not be used to inform deliberations requiring judgments about the effect of the death penalty on homicide. Consequently, claims that research demonstrates that capital punishment decreases or increases the homicide rate by a specified amount or has no effect on the

11. Michael L. Radelet & Traci L. Lacoock, *Do Executions Lower Homicide Rates? The Views of Leading Criminologists*, 99 J. OF CRIM. L. & CRIMINOLOGY 489 (2009).

12. DETERRENCE AND THE DEATH PENALTY 47–100 (Daniel S. Nagin & John v. Pepper eds. 2012), <https://www.law.upenn.edu/live/files/1529-nagin-full-reportpdf>.

13. *Id.*

homicide rate should not influence policy judgments about capital punishment.¹⁴

In short, there is no credible evidence that the death penalty deters more homicides than alternative punishments of long-term prison sentences.¹⁵ In effect, one of the strongest, if not the strongest pro-death penalty arguments discussed in *Furman* and *Gregg* has virtually disappeared.

Incapacitation. This argument in support of the death penalty suggests that we need to execute those convicted of the most vicious murders because as long as they are alive, they will continue to threaten public (or prison) safety.¹⁶ The argument has public appeal because the only way to completely ensure that *anyone* will not kill in the future is to kill them first. For American policy makers, however, the question is how many murders could be prevented by the death penalty instead of allowing for natural death with alternative sentences of long imprisonment or even life imprisonment without parole (LWOP). Research continues to show that offenders convicted of murder have an extremely low recidivism rate.¹⁷ Coupled with the small number of offenders who have been sentenced to death in recent years, this argument is even less influential than it was in the not-too-distant past.

Religious Views. In the 1970s, few religious organizations took formal stands on the death penalty. However, it was not uncommon for some religious leaders to quote biblical passages in favor of the death penalty.¹⁸ Today the vast majority of communities of faith stand

14. *Id.* at 2.

15. One of the authors (MLR) sat through all the legislative debates in Colorado when the death penalty was abolished there in 2020. Deterrence was barely mentioned, and no experts argued that the death penalty was a superior deterrent to life imprisonment. In the end, deterrence was a non-issue.

16. SHAWN D. BUSHWAY, *Incapacitation*, in *ENCYCLOPEDIA OF CRIMINOLOGY AND CRIMINAL JUSTICE* 2443–50 (G. Bruinsman & D. Weidsburd eds. 2014).

17. *See, e.g.*, James W. Marquart & Jonathan R. Sorensen, *A National Study of the Furman-Commuted Inmates: Assessing the Threat to Society from Capital Offenders*, 23 *LOY. L.A. L. REV.* 5 (1989); Ashley Nellis, *A New Lease on Life*, *THE SENTENCING PROJECT* (June 30, 2021), <https://www.sentencingproject.org/reports/a-new-lease-on-life/>.

18. *See generally* JAMES MEGIVERN, *THE DEATH PENALTY: AN HISTORICAL AND THEOLOGICAL SURVEY* (1997).

opposed to executions, and the few outliers are often silent on the issue, offering neither support nor criticism.¹⁹

In 2018, Pope Francis, the leader of the Roman Catholic Church (the largest religious denomination in the U.S.) approved a revision of the Catholic Catechism to say, “a new understanding has emerged of the significance of penal sanctions imposed by the state,” and thus “the death penalty is inadmissible.”²⁰ In other words, the Pope has taken the position that executions are *never* permissible.

Other religious organizations hold similar positions.²¹ There is no question that if state and federal legislators were magically replaced with random samples of clergy from the full range of American religious organizations, the death penalty would rapidly be relegated to the history books.

Cost. Another major reason why Americans favored the death penalty in the 1970s and 1980’s was fiscal. As late as 2014 (the last time the question was asked), when Gallup asked supporters of the death penalty to explain their position,²² results indicated that the second most frequently cited response was to “save taxpayers money /Cost associated with prison.”²³ Research projects by academics, state supreme courts, legislative bodies, and newspapers on this issue have uniformly concluded that the death penalty is enormously expensive,

19. Again, in the Colorado legislative debates about the death penalty, not a single member of the clergy of *any faith or a leader of any religious group, large or small*, spoke in favor of retention. See *Colorado becomes latest state to repeal death penalty*, CATHOLIC NEWS AGENCY (Mar. 24, 2020, 17:19 PM), <https://www.catholicnewsagency.com/news/43967/colorado-becomes-latest-state-to-repeal-death-penalty>.

20. Linda Bordoni, *Pope Francis: Death Penalty ‘Inadmissible’*, VATICAN NEWS (Aug. 2, 2018), <https://www.vaticannews.va/en/pope/news/2018-08/pope-francis-cdf-ccc-death-penalty-revision-ladaria.html>.

21. See *Official Religious Statements*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/facts-and-research/religious-statements/official-religious-statements> (last visited Mar. 1, 2023).

22. Art Swift, *Americans: “Eye for Eye” Top Reason for Death Penalty*, GALLUP (Oct. 23, 2014), <https://news.gallup.com/poll/178799/americans-eye-eye-top-reason-death-penalty.aspx>.

23. This was tied for second place, with “they deserve it,” for the most cited justification for the death penalty. See *Death Penalty*, GALLUP, <https://news.gallup.com/poll/1606/death-penalty.aspx> (last visited Mar. 1, 2023).

much more costly than long-term or life imprisonment.²⁴ Costs are incurred not only for the 1,558 cases that have ended in executions since 1972²⁵ and for the 2,414 trials and (ongoing) appeals of people currently on death row,²⁶ but for the trials and appeals of an estimated 8,770 cases that resulted in death sentences between 1973 and 2021.²⁷ Most of these defendants had their sentences vacated on appeals and were resentenced to prison terms.²⁸ In addition, we need to add the costs of the litigation in (countless) cases in which prosecutors threaten the death penalty but did not seek it at trial, or sought the death penalty only to see juries reject the requests and return prison sentences.

The costs of the death penalty coincides with the important question of how governments can help families of homicide victims. One frequent argument voiced in support of the death penalty is the need to help such co-victims.²⁹ Specifically, is the death penalty, applied to such a small proportion of people convicted of homicide, the best way to do this? Perhaps if we asked only the families of those who have seen the killer of their loved one sentenced to death, the majority would answer affirmatively. But if we asked a representative sample of family members of all homicide victims, the responses would likely be quite different. The priority for the latter is to uncover who killed

24. *Policy Issues: Costs*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/policy-issues/costs> (last visited Mar. 1, 2023).

25. *See Execution Database*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/execution-database> (last visited Mar. 1, 2023) (statistic current through December 31, 2022).

26. Deborah Fins, *Death Row U.S.A. Spring 2022*, NAACP L. DEF. FUND, <https://www.naacpldf.org/wp-content/uploads/DRUSASpring2022-22.pdf> (statistic current as of April 1, 2022).

27. *See National Death Sentences by Year*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/facts-and-research/sentencing-data/death-sentences-in-the-united-states-from-1977-by-state-and-by-year> (last visited Mar. 1, 2023).

28. Frank R. Baumgartner & Anna W. Dietrich, *Most Death Penalty Sentences are Overturned. Here's why that Matters*, WASH. POST (Mar. 17, 2015), <https://www.washingtonpost.com/news/monkey-cage/wp/2015/03/17/most-death-penalty-sentences-are-overturned-heres-why-that-matters/>.

29. For a recent version of this argument, see Jayson Knight, *Death Penalty is Justice for Families of Homicide Victims*, OFF. OF OKLA. ATT'Y GEN. (Oct. 26, 2022), <https://www.oag.ok.gov/articles/central-oklahoma-weeklies-death-penalty-justice-families-murder-victims>.

their loved one. Remarkably, the proportion of homicides that “cleared” with the arrest of a suspect in 2020 slipped below 50 percent.³⁰

In the 1960s, more than 90 percent of all homicides were “cleared” by police, with an arrest or the identification of a dead suspect. But the clearance rate has declined in each of the past six decades. In the most recent data available from the FBI, the clearance rate hit an all-time low of just over 50 percent. That means that about half of all murders in the United States today go unsolved.³¹

Using funds, now expended on a relatively small number of death penalty cases, towards improving the declining number of homicides cleared by arrest would not only render needed assistance to the families of the victims, but would make our communities safer by removing more murderers from our streets.

Worst of the Worst? When *Furman* and *Gregg* were decided, many supporters of the death penalty thought the legislature could construct statutes that confined the death penalty to only “the worst of the worst.”³² In the past fifty years, the Supreme Court has made numerous attempts to achieve this goal, including banning the death penalty for juveniles,³³ the intellectually disabled,³⁴ and offenders with severe mental illness who cannot rationally understand the reason for their impending execution.³⁵ Nonetheless, research continues to doc-

30. See, e.g., Weihua Li & Jamiles Lartey, *As Murders Spiked, Police Solved about Half in 2020*, THE MARSHALL PROJECT (Jan. 12, 2022, 6:00 AM), <https://www.themarshallproject.org/2022/01/12/as-murders-spiked-police-solved-about-half-in-2020>.

31. Derek Thompson, *Six Reasons Why the Murder Clearance-Rate is at an All-Time Low*, THE ATLANTIC (July 7, 2022), <https://www.theatlantic.com/news/letters/archive/2022/07/police-murder-clearance-rate/661500/>.

32. See, e.g., Austin Sarat, *The Illusory Quest to Execute Only ‘The Worst of the Worst’*, VERDICT (JUSTIA) (June 9, 2020), <https://verdict.justia.com/2020/06/09/the-illusory-quest-to-execute-only-the-worst-of-the-worst>.

33. See generally *Roper v. Simmons*, 543 U.S. 551 (2005).

34. *Atkins v. Virginia*, 536 U.S. 304, 311–21 (2002).

35. *Panetti v. Quarterman*, 551 U.S. 930 (2007). See generally KENT MILLER & MICHAEL L. RADELET, *EXECUTING THE MENTALLY ILL: THE CRIMINAL JUSTICE SYSTEM AND THE CASE OF ALVIN FORD* (1992).

ument pervasive racial bias with death penalty convictions.³⁶ Even more astonishing is that since 1972, there have been nearly 200 people sentenced to death in the U.S. who were later released as a result of significant doubts surrounding their guilt.³⁷

The Search for a “Humane” Method of Execution. The history of the death penalty can be seen as a centuries-long struggle to find less painful methods of execution, and that search has increased in intensity since the *Furman* decision.³⁸ No longer do people even consider more torturous methods of execution such as burning at the stake, breaking at the wheel, or crucifixion.³⁹ In Colorado from 1890 through 1930, inmates were hanged with an “upright jerker,” which affixed their heads with a rope pulled through two pullies on a horizontal beam, with weights nearing 1,000 pounds being dropped on the other end, in an effort to ensure that the prisoners’ necks would be broken.⁴⁰

Since *Furman*, five methods have been used to execute prisoners in the United States: hanging, the gas chamber, firing squad, the electric chair, and lethal injection.⁴¹ In the last ten years (between January 1, 2013, and December 31, 2022), five inmates died in electric chairs and the other 233 executed inmates were put to death by lethal injec-

36. For reviews of this research, see U.S. General Accounting Agency, *Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities* (GGD-90-57) 5 (1990); David C. Baldus & George Woodworth, *Race Discrimination in the Administration of the Death Penalty: An Overview of the Empirical Research with Special Emphasis on the Post-1990 Research*, 39 CRIM. L. BULL. 194 (2003); CATHERINE M. GROSSO ET AL., *Race Discrimination and the Death Penalty: An Empirical and Legal Overview*, in AMERICA’S EXPERIMENT WITH CAPITAL PUNISHMENT 3d ed. 525 (James R. Acker et al., eds. 2014).

37. See *Innocence*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/policy-issues/innocence> (last visited Mar. 1, 2023). The list of erroneous convictions in death penalty cases was started by one of the present authors in the 1980s. Hugo Adam Bedau & Michel L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 29–31 (1987).

38. See generally STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* (2002).

39. *Id.*

40. This resulted in newspaper headlines with such titles as “Jerked to Jesus” or “Launched to Eternity.” MICHAEL L. RADELET, *THE HISTORY OF THE DEATH PENALTY IN COLORADO* 36–38 (2017).

41. *Methods of Execution*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/methods-of-execution> (last visited Mar. 1, 2023).

tion.⁴² To this day, a disturbing number of executions continue to be botched.⁴³

As we see it, the search for a method of more “humane” methods of execution comes at an interesting time since the increasingly common (perhaps the sole) justification for the death penalty is retribution. The question of how much retribution to inflict is not an empirical question that easily lends itself to tests with quantitative data. Determining what offenders (or anyone else) “deserves” can never be definitively proven. How can one “disprove” a plea by the parents of a murdered child that the killer “deserves” to be boiled to death? Nonetheless, at the same time, we have seen the justification for executions to rest on retributive principles, Americans seem to be uncomfortable with more painful methods of execution. States have now moved to almost exclusively using lethal injection, which we believe is because most Americans see it as less agonizing. That is a contradiction that has yet to be resolved.

CONCLUSION

The worldwide demise in the death penalty can be seen in the dwindling number of countries that use it. In the U.S., in the past fifty years we have seen fewer executions, fewer people sentenced to death, and a dozen states that have abolished it altogether. More subtle changes can be observed in the ways in which the death penalty is debated and justified. Most of the empirical justifications – those that can be addressed by the collection of solid data – have fallen out of favor.

Is this a one-way street?

42. Figures computed from *Execution Database*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/execution-database?start-date=01/01/2013&end-date=12/31/2022> (last visited Mar. 1, 2023).

43. Michael L. Radelet, *Examples of Post-Furman Botched Executions*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/botched-executions> (last visited Mar. 1, 2023).