



Death Penalty

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Background

History of Death Penalty Laws

The first recognized death penalty laws date back to eighteenth century B. C. and can be found in the Code of King Hammurabi of Babylon. The Hammurabi Code prescribed the death penalty for over twenty different offenses. The death penalty was also part of the Hittite Code in the fourteenth century B. C. The Draconian Code of Athens, in seventh century B. C., made death the lone punishment for all crimes. In the fifth century B. C., the Roman Law of the Twelve Tablets also contained the death penalty. Death sentences were carried out by such means as beheading, boiling in oil, burying alive, burning, crucifixion, disembowelment, drowning, flaying alive, hanging, impalement, stoning, strangling, being thrown to wild animals, and quartering (being torn apart).

In Britain, hanging became the usual method of [EXECUTION](#) in the tenth century A. D. In the eleventh century, William the Conqueror would not allow persons to be hanged or otherwise executed for any crime, except in times of war. However, this trend did not last long. In the sixteenth century, as many as 72,000 people are estimated to have been executed under the reign of Henry VIII. Common execution methods used during this time included boiling, burning at the stake, hanging, beheading, and drawing and quartering. Various capital offenses included marrying a Jew, not confessing to a crime, and [TREASON](#).

The number of capital crimes in Britain increased throughout the next two centuries. By the 1700s, over two hundred crimes were punishable by death in Britain, including stealing, cutting down a tree, and robbing a rabbit warren. However, due to the severity of the death penalty, many juries would not convict defendants if offenses were not serious. Such beliefs led to early reform of Britain's death penalty. From 1823 to 1837, the death sentence was eliminated for over half of the crimes previously punishable by death.

The United States and the Death Penalty

In colonial North America, use of the death penalty was strongly influenced by European practices. When European settlers came to the new world, they brought along their practice of [CAPITAL PUNISHMENT](#). In the territory now recognized as the United States, the first known execution was that of Captain George Kendall in the Jamestown colony of Virginia in 1608. Kendall was executed for being a spy for Spain. In

1612, Virginia governor Sir Thomas Dale enacted the Divine, Moral and Martial Laws, which provided the death penalty for even minor offenses such as stealing grapes, killing chickens, and trading with Indians.

Death penalty laws varied considerably from colony to colony. The Massachusetts Bay Colony held its first execution in 1630, although the Capital Laws of New England did not go into effect until many years later. The New York Colony instituted the Duke's Laws of 1665. Under these laws, offenses such as striking one's mother or father or denying the "true God," were punishable by death.

The Abolitionist Movement

The Colonial Period

The abolitionist movement is rooted in the writings of European social theorists Montesquieu, Voltaire, and Bentham, and English Quakers John Bellers and John Howard. However, it was a 1767 essay, *On Crimes and Punishment*, written by Cesare Beccaria, which principally influenced thinking about punishment throughout the world. Beccaria wrote that there was no justification for the state's taking of a life. The essay gave abolitionists an authoritative voice and renewed energy, one result of which was the [ABOLITION](#) of the death penalty in Austria and Tuscany. Scholars in the United States were also affected by Beccaria's work. The first known attempted reforms of the death penalty in the United States occurred when Thomas Jefferson introduced a bill to revise Virginia's capital punishment laws, recommending that the death penalty be used only in the case of murder and treason offenses. Jefferson's bill was defeated by one vote.

Other challenges to early capital punishment laws were based on the idea that the death penalty was not a true deterrent. Dr. Benjamin Rush, founder of the Pennsylvania Prison Society, believed in the brutalization effect and argued that having a death penalty actually increased criminal behavior. Benjamin Franklin and Philadelphia attorney general William Bradford supported Rush. Bradford, who would later become the U. S. attorney general, led Pennsylvania to become the first state to consider degrees of murder based on culpability. In 1794, Pennsylvania repealed the death penalty for all offenses except premeditated murder.

The Nineteenth Century

In the early to mid-nineteenth century United States, the abolitionist movement gained support in the northeast. In the early part of the century, many states reduced the number of capital crimes and built state penitentiaries. In 1834, Pennsylvania became the first state to move executions away from the public by carrying them out in correctional facilities. In 1846, Michigan was the first state to abolish the death penalty for all crimes except treason. Later, Rhode Island and Wisconsin abolished the death penalty for all crimes. By the end of the century, the countries of Venezuela, Portugal, Netherlands, Costa Rica, Brazil, and Ecuador followed suit. While some states began abolishing the death penalty, most held onto it. Some states even made more crimes punishable by death, especially those committed by slaves. In 1838, in an effort to make the death penalty more acceptable to the public, some states began passing laws against mandatory death sentencing, instead enacting discretionary death penalty statutes. The 1838 enactment of discretionary death penalty statutes in Tennessee and later in Alabama were seen as a great reform. This introduction of sentencing discretion in the capital process was perceived as a victory for abolitionists because prior to the enactment of these statutes, all states mandated the death penalty for anyone convicted of a capital crime, regardless of circumstances. With the exception of a small number of rarely committed crimes in a few jurisdictions, all mandatory capital punishment laws were abolished by 1863.

During the Civil War, opposition to the death penalty diminished, as more attention was given to the anti-slavery movement. After the war, new developments in the means of executions emerged. In 1888, the

electric chair was introduced in the state of New York. In 1890 William Kemmler became the first man executed by electrocution. Other states followed New York and used the electric chair as the primary method of execution.

The Progressive Period

While some states eliminated the death penalty in the mid-nineteenth century, it was the first half of the twentieth century that marked the beginning of the Progressive Period of reform in the United States. From 1907 to 1917, six states completely outlawed the death penalty, and three limited it to the rarely committed crimes of treason and first-degree murder of a law enforcement official. These reforms did not last long. There was a frenzied atmosphere in the United States, as citizens began to panic about the threat of revolution in the wake of the Russian Revolution. In addition, the United States had recently entered World War I, and there were intense class conflicts as socialists mounted the first serious challenge to capitalism. By 1920, these circumstances led five of the six abolitionist states to return to capital punishment.

In 1924, the use of cyanide gas was introduced in the state of Nevada as a more humane way of execution. Gee Jon was the first person executed by lethal gas. The state tried to pump cyanide gas into Jon's cell while he slept, but this proved impossible, and the gas chamber was constructed.

From the 1920s to the 1940s, there was a revival in the use of the death penalty, due, in part, to the writings of criminologists, who argued that the death penalty was a necessary social measure. In the United States, people were suffering through Prohibition and the Great Depression. There were more executions in the 1930s than in any other decade in U. S. history, an average of 167 per year.

In the 1950s, however, public sentiment began to turn against capital punishment. Many allied nations either abolished or limited the death penalty, and in the U. S., the number of executions dropped dramatically. Whereas there were 1,289 executions in the 1940s, there were 715 in the 1950s, and the number fell even further, to only 191, from 1960 to 1976. In 1966, support for capital punishment reached an all-time low. A Gallup poll showed support for the death penalty at only 42%.

The United States Constitution and the Death Penalty

Death Penalty Challenges

The 1960s brought challenges to the presumed legality of the death penalty. Before then, the Fifth, Eighth, and Fourteenth Amendments were interpreted as permitting the death penalty. However, in the early 1960s, it was suggested that the death penalty was a "cruel and unusual" punishment and, therefore, unconstitutional under the Eighth Amendment. In 1958, the Supreme Court decided in *Trop v. Dulles* (356 U. S. 86), that the Eighth Amendment contained an "evolving standard of decency that marked the progress of a maturing society." Although *Trop* was not a death penalty case, abolitionists applied the Court's logic to executions and maintained that the United States did indeed progress to a point that its "standard of decency" should no longer tolerate the death penalty. In the late 1960s, the Supreme Court began to reconsider the way the death penalty was administered. In 1968, the Court heard two cases which dealt with prosecutorial and jury discretion in capital cases. In *U. S. v. Jackson* (390 U.S. 570), the Supreme Court heard arguments regarding a provision of the federal KIDNAPPING STATUTE requiring that the death penalty be imposed only upon recommendation of a jury. The Court held that this practice was unconstitutional because it encouraged defendants to waive their right to a jury trial to ensure they would not receive a death sentence.

In *Witherspoon v. Illinois* (391 U. S. 510), the Supreme Court maintained that a potential juror's reservations

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about the death penalty were insufficient grounds to prevent that person from serving on the jury in a death penalty case. Jurors could be disqualified only if prosecutors could show that their attitudes toward capital punishment would prevent them from making an [IMPARTIAL](#) decision about the punishment.

In 1971, the Supreme Court twice addressed the problems associated with the role of jurors and their discretion in capital cases, in *Crampton v. Ohio* and *McGautha v. California* (consolidated under 402 U. S. 183). The defendants argued it was a violation of their Fourteenth Amendment right to due process for jurors to have unrestricted discretion in deciding whether the defendants should live or die, and such discretion resulted in arbitrary and capricious sentencing. Crampton also argued that it was unconstitutional to have his guilt and sentence determined in one set of deliberations, as the jurors in his case were instructed that a first-degree murder [CONVICTION](#) would result in a death sentence. The Court rejected these claims, thereby approving of unfettered jury discretion and a single proceeding to determine guilt and sentence. The Court stated that guiding capital sentencing discretion was "beyond present human ability."

Temporary Abolition of the Death Penalty

The issue of arbitrariness of the death penalty was again brought before the Supreme Court in 1972 in *Furman v. Georgia*, *Jackson v. Georgia*, and *Branch v. Texas* (known collectively as the landmark case *Furman v. Georgia* (408 U. S. 238)). Furman, like McGautha, argued that capital cases resulted in arbitrary and capricious sentencing. Furman, however, was a challenge brought under the Eighth Amendment, unlike McGautha, which was a Fourteenth Amendment due process claim. With the *Furman* decision the Supreme Court set the standard that a punishment would be "cruel and unusual" if it were too severe for the crime, if it were arbitrary, if it offended society's sense of justice, or if it were not more effective than a less severe penalty.

In nine separate opinions, and by a vote of 5-4, the Court held that Georgia's death penalty statute, which gave the jury full discretion in sentencing, could result in arbitrary sentencing. The Court maintained that the scheme of punishment under the statute was thus "cruel and unusual" and violated the Eighth Amendment. As a result, the Supreme Court voided forty death penalty statutes on June 29, 1972, thereby commuting the sentences of 629 death row inmates in the United States and suspending the death penalty because existing statutes were no longer valid.

Reinstatement of the Death Penalty

Although the separate opinions by Justices Brennan and Marshall stated that the death penalty itself was unconstitutional, the overall conclusion in *Furman* was that the specific death penalty statutes were unconstitutional. That decision by the Court opened the door for states to revise death penalty statutes to eliminate the problems cited in *Furman*. Advocates of capital punishment began proposing new statutes that they believed would end arbitrariness of capital sentences. The states were led by Florida, which rewrote its death penalty statute only five months after *Furman*. Shortly after, 34 other states enacted new death penalty statutes. To address the unconstitutionality of unguided jury discretion, some states removed all discretion by mandating capital punishment for those convicted of capital crimes. This practice was ultimately found unconstitutional by the Supreme Court in *Woodson v. North Carolina* (428 U.S. 280 [1976]).

Other states began to limit discretion by providing sentencing guidelines for judges and juries considering death sentences. Such guidelines allowed for the introduction of aggravating and mitigating factors in sentencing. In 1976, the Supreme Court approved these discretionary guidelines in *Gregg v. Georgia* (428 U. S. 153), *Jurek v. Texas* (428 U. S. 262), and *Proffitt v. Florida* (428 U. S. 242), collectively referred to as the *Gregg* decision. This landmark decision held that the new death penalty statutes in Florida, Georgia, and Texas were constitutional, thus reinstating the death penalty in those states. Additionally, the Court maintained that the death penalty itself was constitutional under the Eighth Amendment.

In addition to sentencing guidelines, the Court approved three additional reforms in the *Gregg* decision. The first was bifurcated trials, in which there are separate deliberations for the guilt and penalty phases of the trial. Only after the jury determines that the [DEFENDANT](#) is guilty of capital murder does it decide in a second trial whether the defendant should be sentenced to death or given a lesser sentence of prison time. Another reform was the practice of automatic [APPELLATE](#) review of convictions and sentence. The final procedural reform was proportionality review, a practice that assists states in identifying and eliminating disparities in sentencing. The state [APPELLATE COURT](#) can use this process to compare the sentence in a case being reviewed with other cases within the state, to see if it is disproportionate. Because the reforms were acknowledged by the Supreme Court, some states wishing to reinstate their death penalty sentences included them in revised statutes. However, inclusion was not required by the Court. Therefore, some of the resulting new statutes include variations on the procedural reforms found in *Gregg*.

The ten-year moratorium on executions that began with the *Jackson* and *Witherspoon* decisions ended on January 17, 1977, with the execution of Gary Gilmore by firing squad in Utah. Gilmore did not challenge his death sentence. That same year, Oklahoma became the first state to adopt lethal injection as a means of execution, though it would be five more years until Charles Brooks became the first person executed by lethal injection in Texas on December 2, 1982.

Recent Developments in the Death Penalty

Capital Punishment at the Federal Level

In addition to the death penalty laws in many states, the federal government has also employed capital punishment for certain federal offenses, such as murder of a government official, kidnapping resulting in death, running a large-scale drug enterprise, and treason. When the Supreme Court struck down state death penalty statutes in *Furman*, the federal death penalty statutes suffered from the same problems that the state statutes did. As a result, death sentences under the old federal death penalty statutes have not been upheld.

In 1988, a new federal death penalty statute was enacted for murder in the course of a drug-kingpin [CONSPIRACY](#). The statute was modeled on the post-*Gregg* statutes that the Supreme Court had approved. Since its enactment, six people have been sentenced to death for violating this law, though none has been executed.

In 1994, President Clinton signed the Violent Crime Control and Law Enforcement Act that expanded the federal death penalty to sixty crimes, three of which do not involve murder. The exceptions are [ESPIONAGE](#), treason, and drug trafficking in large amounts.

Two years later, in response to the Oklahoma City bombing of a federal building, President Clinton signed the Anti-Terrorism and Effective Death Penalty Act of 1996. The Act, which affects both state and federal prisoners, restricts review in federal courts by establishing stricter filing deadlines, limiting the opportunity for evidentiary hearings, and ordinarily allowing only a single [HABEAS CORPUS](#) filing in federal court. Proponents of the death penalty argue that this streamlining will speed up the death penalty process and significantly reduce its cost, although others fear that quicker, more limited federal review may increase the risk of executing innocent defendants.

Worldwide Abolition

In the 1980s the international abolition movement gained momentum, and treaties proclaiming abolition were drafted and ratified. Protocol No. 6 to the European Convention on **HUMAN RIGHTS** and its successors, the

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Inter-American Additional Protocol to the American Convention on Human Rights to Abolish the Death Penalty, and the United Nations' Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty, were created with the goal of making abolition of the death penalty an international norm.

Today, the Council of Europe requires new members to undertake and ratify Protocol No. 6. This requirement has, in effect, led to the abolition of the death penalty in Eastern Europe. For example, the Ukraine, formerly one of the world's leaders in executions, halted the death penalty and was admitted to the Council. South Africa's parliament voted to formally abolish the death penalty, which had earlier been declared unconstitutional by the Constitutional Court. In addition, in June 1999, Russian president, Boris Yeltsin, signed a [DECREE](#) commuting the death sentence for all of the convicts on Russia's death row.

Capital Punishment Today

In April 1999, the United Nations Human Rights Commission passed the Resolution Supporting Worldwide Moratorium on Executions. The resolution calls on countries which have not abolished the death penalty to restrict the use of the death penalty, including not imposing it on juvenile offenders and limiting the number of offenses for which it can be imposed. Ten countries, including the United States, China, Pakistan, Rwanda, and Sudan voted against the resolution.

Currently, more than half of the countries in the international community have abolished the death penalty completely, de facto, or for ordinary crimes. However, over ninety countries retain the death penalty, including China, Iran, and the United States, all of which ranked among the highest for international executions in 1998.

Recent Death Penalty Statistics

Since the reinstatement of the death penalty in *Gregg v. Georgia*, the majority of inmates under sentence of death have been white. In 1999, the most recent year for which Bureau of Justice Statistics data were available, there were 1,948 white inmates on death row, followed by 1,514 African-American inmates, 325 Hispanic inmates, 28 American Indian inmates, 24 Asian inmates, and 13 identified as "other race." In 1999, the most inmates per year (98) were executed since the 1950s. The majority of executions (94) conducted in 1999 were by lethal injection, while a small number (3) were by electrocution, and 1 took place by lethal gas. The data available indicate that almost two-thirds of those sentenced to death had previous [FELONY](#) convictions, and slightly less than ten percent had prior convictions for [HOMICIDE](#). Ages of inmates sentenced to death ranged from 18 to 84. Additionally, 50 women were under sentence of death at the end of 1999.

Methods of Execution by State

In 2001, 38 of the fifty states in the United States allow the death penalty. These states permit executions by the following means:

ALABAMA: electrocution

ARIZONA: gas chamber, lethal injection

ARKANSAS: electrocution, lethal injection

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CALIFORNIA: gas chamber, lethal injection

COLORADO: lethal injection

DELAWARE: lethal injection

FLORIDA: electrocution

GEORGIA: electrocution

IDAHO: firing squad, lethal injection

ILLINOIS: lethal injection

INDIANA: electrocution

KANSAS: lethal injection

KENTUCKY: electrocution

LOUISIANA: lethal injection

MARYLAND: gas chamber

MISSISSIPPI: gas chamber, lethal injection

MISSOURI: lethal injection

MONTANA: hanging, lethal injection

NEBRASKA: electrocution

NEVADA: lethal injection

NEW HAMPSHIRE: lethal injection

NEW JERSEY: lethal injection

NEW MEXICO: lethal injection

NEW YORK: lethal injection

NORTH CAROLINA: gas chamber, lethal injection

OHIO: electrocution, lethal injection

OKLAHOMA: lethal injection

OREGON: lethal injection

PENNSYLVANIA: lethal injection

Methods of Execution by State

RHODE ISLAND: electrocution

SOUTH CAROLINA: electrocution

SOUTH DAKOTA: lethal injection

TENNESSEE: electrocution

TEXAS: lethal injection

UTAH: firing squad, lethal injection

VIRGINIA: electrocution, lethal injection

WASHINGTON: hanging, lethal injection

WYOMING: lethal injection

Additional Resources

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Organizations

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