The Unconstitutionality of Capital Punishment for Murder: Practical Abolition Without Complete Prohibition

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Abstract: This Article proposes a subtle but consequential shift in constitutional arguments against the death penalty. Rather than contending that capital punishment is unconstitutional in all circumstances, it argues that contemporary national standards of decency prohibit capital punishment for the crime of murder. This strategic refinement avoids a direct challenge to the general constitutionality of capital punishment while fitting squarely within the Supreme Court's established Eighth Amendment jurisprudence evaluating the permissibility of capital punishment for particular offenses. Applying the Court's objective-indicia framework, the Article demonstrates that a national consensus against death sentences for murder has emerged through legislative repeal, executive moratoria, and sustained non-use of capital punishment. The Article also advances an originalist argument that capital punishment is inconsistent with the original public meaning of the Eighth Amendment. Capital punishment was tolerated in the Founding Era as a last resort necessitated by the absence of secure prisons. Modern incarceration and life-without-parole sentences eliminate the necessity of capital punishment, making executions cruel based on term's original meaning. By reframing abolition as a categorical limit on capital punishment for murder rather than a rejection of capital punishment per se, the Article offers a doctrinally modest, historically grounded, and institutionally plausible path to effective abolition that directly implicates all existing death sentences without requiring the Court to overrule its precedents.

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INTRODUCTION

Based on activity before the U.S. Supreme Court, one might assume that Georgia remains firmly committed to capital punishment. The Court has reviewed Georgia death sentences repeatedly, including in its landmark decisions in *Furman v. Georgia* and *Gregg v. Georgia* decisions.[1] But times change, and appearances can be deceiving. So far this decade, Georgia has imposed only one death sentence,[2] and carried out only two executions.[3] Georgia's death row, down to thirty-six inmates,[4] is largely populated by men who were sentenced to death last century.[5] Having actively supported capital punishment in the 1970s, 1980s, and 1990s, Georgia has quietly abandoned capital punishment in favor of life imprisonment.[6]

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[1] The Court has published at least twenty-four opinions in capital cases arising out of Georgia. *See* Nance v. Ward, 597 U.S. 159 (2022); Tharpe v. Sellers, 583 U.S. 33 (2018); Wilson v. Sellers, 584 U.S. 122 (2018); Foster v. Chatman, 578 U.S. 488 (2016); Hittson v. Chatman, 576 U.S. 1028 (2015); Jefferson v. Upton, 560 U.S. 284 (2010); Sears v. Upton, 561 U.S. 945 (2010); Felker v. Turpin, 518 U.S. 651 (1996); McCleskey v. Zant, 499 U.S. 467 (1991); Ford v. Georgia, 498 U.S. 411 (1991); Amadeo v. Zant, 486 U.S. 214 (1988); Burger v. Kemp, 483 U.S. 776 (1987); McCleskey v. Kemp, 481 U.S. 279 (1987); Francis v. Franklin, 471 U.S. 307 (1985); Zant v. Stephens, 462 U.S. 862 (1983); Godfrey v. Georgia, 446 U.S. 420 (1980); Green v. Georgia, 442 U.S. 95 (1979); Coker v. Georgia, 433 U.S. 584 (1977); Gregg v. Georgia, 428 U.S. 153 (1976); Furman v. Georgia, 408 U.S. 238 (1972); Whitus v. Georgia, 385 U.S. 545 (1967); Williams v. Georgia, 349 U.S. 375 (1955); Avery v. Georgia, 345 U.S. 559 (1953); Solesbee v. Balkcom, 339 U.S. 9 (1950).

[2] *See Death Penalty Census Database*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/facts-and-research/data/death-penalty-census/sentences?jurisdiction=Georgia&sort=year/desc (last visited Dec. 23, 2025).

[3] *See Executions Database*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/facts-and-research/data/executions?state=Georgia&federal=No&sort=dateString/desc (last visited Dec. 23, 2025).

[4] *See Death Row Overview*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/death-row/overview (last visited Dec. 23, 2025).

[5] Ricky Dubose was sentenced to death in 2022. *See* Brandon McGouirk, *Jury Sentences Ricky Dubose to Death for 2017 Prison Guard Murders*, WGXA NEWS (June 16, 2022), https://wgxa.tv/news/local/ricky-dubose-sentenced-by-jury-to-death. Dubose committed suicide on death row shortly after sentencing. *See* Tina Burnside, *Georgia Man Who Was Sentenced to Death in Murder of 2 Prison Guards Found Dead in Apparent Suicide, Officials Say*, CNN (June 27, 2022), https://www.cnn.com/2022/06/27/us/georgia-prisoner-suicide. As of this writing, there is currently no one on Georgia's death row with a death sentence imposed in the 2020s. There are, by contrast, twenty inmates with death sentences imposed last century, including four from the 1970s. See *Death Penalty Census Database*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/facts-and-research/data/death-penalty-census/sentences?jurisdiction=Georgia&case-status=Active+Death+Sentence&sort=year/desc.

[6] *See* Carlos Wood, *"Death Is Different": The Decrease in Death Penalty Sentencing in Georgia*, 75 MERCER L. REV. 91, 92-95 (2023); Brian S. Kammer, *The Death Penalty in Retreat*, 37 CRIM. JUST. 14, 14-16 (2023); Michael E. Silverman, *Toward a Modern, Apolitical Death Penalty Abolition Movement in Georgia (and Other Conservative States)*, 3 SAVANNAH L. REV. 251, 252-54 (2016).

This pattern is not unique to Georgia. Since the beginning of the twenty-first century, support for capital punishment has declined throughout the United States. This century, fifteen states have abolished capital punishment, and no state has adopted it.[7] Several additional states have officially halted executions. In many retentionist states, death sentences are extremely rare or nonexistent. Even the few states that continue to impose more than one death sentence per year do so at rates dramatically lower than in prior decades.[8]

Some judges and scholars argued that capital punishment is cruel and unusual in all circumstances.[9] That argument, however, is constitutionally suspect and unlikely to prevail before the current Court.[10] This Article therefore considers a more limited constitutional claim: that capital punishment is unconstitutional as applied to the crime of murder. While the Constitution generally permits capital trials and the deprivation of life,[11] the government's authority to punish crimes with death is not unlimited. The Supreme Court has long recognized that capital punishment may violate the Eighth Amendment when applied to particular offenses or offenders.[12] By reframing the abolitionist challenge as an offense-specific argument rather than a categorical rejection of capital punishment, this Article seeks to achieve the same practical result without requiring the Court to repudiate its precedents.[13]

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[7] *See infra* Section III.A.

[8] *See infra* Section III.B.

[9] *See*, *e.g.*, *Furman*, 408 U.S. at 240 (Douglas, J., concurring) ("I vote to vacate each judgment, believing that the exaction of the death penalty does violate the Eighth and Fourteenth Amendments."); *Id.* at 305 (Brennan, J., concurring); *Id.* at 370 (Marshall, J., concurring); Callins v. Collins, 510 U.S. 1141, 1145-46 (1994) (Blackmun, J., dissenting from denial of certiorari); Baze v. Rees, 553 U.S. 35, 78-86 (2008) (Stevens, J., concurring). *See also* John D. Bessler, *The Concept of "Unusual Punishments" in Anglo-American Law: The Death Penalty as Arbitrary, Discriminatory, and Cruel and Unusual*, 13 NW. J.L. & SOC. POL'Y 307 (2017) (arguing that the death penalty constitutes cruel and unusual punishment); Kevin Barry, *The Death Penalty & the Dignity Clauses*, 102 IOWA L. REV. 383 (2016); Hannah Freedman, *The Modern Federal Death Penalty: A Cruel and Unusual Punishment*, 107 CORNELL L. REV. 1689 (2021).

[10] *See* Renee Knake, *Abolishing Death*, 13 DUKE J. CONST. L. & PUB. POL'Y 1 (2017) (arguing for a constitutional amendment to abolish capital punishment for all crimes).

[11] *But see* Joseph Blocher, *The Death Penalty and the Fifth Amendment*, 111 NW. U.L. REV. 275 (2016) (arguing that constitutional references to capital punishment do not authorize it).

[12] *See infra* Section I.

[13] In *Kennedy*, the Court noted that only two prisoners were on death row nationwide for child rape at the time, both in Louisiana. *See* Kennedy v. Louisiana, 554 U.S. 407, 434 (2008). All active death sentences are for homicide offenses. *See Crimes Punishable by Death*, DEATH PENALTY INFO. CTR. (n.d.), https://deathpenaltyinfo.org/facts-and-research/background/crimes-punishable-by-death.

This Article proceeds in four Parts. Part I identifies two leading approaches for determining which crimes may constitutionally be punished by death: the Court's contemporary standards of decency framework, which looks to state laws and practices as objective indicia of social values, and an originalist approach grounded in the Eighth Amendment's original public meaning. Part II applies contemporary standards of decency and demonstrates that a national consensus has emerged against capital punishment for murder.

Part III advances an originalist argument against capital punishment for murder, distinguishing the Eighth Amendment's fixed principle from its application across historical contexts. Although executions were tolerated at the Founding as a necessary means of incapacitation in a world without secure prisons, modern incarceration eliminates that necessity. As a result, capital punishment for murder now inflicts unnecessary suffering and violates the Eighth Amendment's original public meaning.

Part IV considers the practical and institutional consequences of prohibiting capital punishment for murder, including effects on future prosecutions, federal capital offenses, and individuals currently sentenced to death. The Article concludes by arguing that this approach offers a doctrinally modest, historically grounded path to effective abolition consistent with both evolving standards jurisprudence and originalist methodology.

I. WHICH CRIMES MAY BE PUNISHED WITH DEATH?

The first federal criminal statute, the Crimes Act of 1790, enumerated seven capital crimes: treason, murder, robbery, piracy, mutiny, counterfeiting, and aiding the escape of a condemned prisoner.[14] The Act dramatically reduced the number of capital offenses relative to the colonial era, when the Crown made hundreds of offenses "worthy of instant death."[15] Because Congress passed the Crimes Act soon after approving the Bill of Rights,[16] it is reasonable to infer that the Founders regarded death as an appropriate punishment for some crimes, including murder, and not categorically cruel and unusual punishment.

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[14] Act for the Punishment of Certain Crimes Against the United States, ch. 9, 1 Stat. 112 (1790). The Act for the Punishment of Certain Crimes against the United States specifies jurisdictional requirements for crimes like murder and robbery which are also punishable under state law.

[15] WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND *18 (1769).

[16] The Bill of Rights was approved by Congress in 1789 and ratified by the states in 1791.

The nation's original list of capital crimes remains partially intact. Treason and murder remain capital offenses under federal law, while the others are no longer punishable by death.[17] This historical evolution raises a central constitutional question: how do we determine whether death is a permissible punishment or a cruel and unusual one?

A. Constitutional Authority and Limits

Assuming that the Constitution confers at least implicit authority for capital punishment,[18] it follows that the death penalty cannot be unconstitutional in all cases.[19] The government may make crimes punishable by death, but its authority is constrained by the Bill of Rights, notably the Eighth Amendment.[20] The constitutional question, therefore, is not whether capital punishment is ever permitted, but which crimes may be punished by death.[21]

The view that the Constitution permits capital punishment for some, but not all, offenses is consistent with its text and structure. The Constitution does not enumerate capital crimes, nor does it exempt any particular offense from the Eighth Amendment's general prohibition. As with other grants of governmental power, the Constitution conveys authority while simultaneously limiting its exercise to protect individual rights.

Had the Framers intended to preserve capital punishment for specific offenses notwithstanding those limits, they could have said so explicitly—as they did elsewhere for crimes

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[17] *See supra* Section IV.B.

[18] *See*, *e.g.*, Bucklew v. Precythe, 587 U.S. 119, 129 (2019) ("The Constitution allows capital punishment.").

[19] Given the current composition of the Roberts Court, arguments that capital punishment is per se unconstitutional are unlikely to prevail. *See* Carol S. Steiker & Jordan M. Steiker, *The Court and Capital Punishment on Different Paths: Abolition in Waiting*, 29 WASH. & LEE J. CIV. RTS. & SOC. JUST. 1, 40 (2022).

[20] The Eighth Amendment applies to state governments through the Fourteenth Amendment. *See* Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 463 (1947).

[21] By the same logic, one wonders whether the Constitution implicitly authorizes archaic punishments like maiming and branding in its reference to "jeopardy of life or limb." *See* U.S. CONST., amend. V. Bodily punishments—including limb severance and castration—have historically been used in both Europe and the United States. *See* Steven S. Kan, *Corporate Punishments and Optimal Incapacitation*, 25 J. LEGAL STUD. 121, 123-25 (1996). However, "[s]urgical castration is generally considered to be a paradigmatic example of cruel and unusual punishment." John F. Stinneford, *Incapacitation Through Maiming: Chemical Castration, the Eighth Amendment, and the Denial of Human Dignity*, 3 U. ST. THOMAS LJ 559, 593 (2005).

such as treason, bribery, and piracy.[22] Several state constitutions take precisely that approach. [23] New Jersey's Constitution, for example, expressly authorizes capital punishment for murder despite its general prohibition on cruel and unusual punishments.[24] The U.S. Constitution contains no comparable exemption for either capital punishment generally or murder specifically.[25]

It therefore follows that some, but not all, crimes may be punishable by death consistent with the Constitution. Determining which crimes qualify requires interpretation of the Eighth Amendment. While the Amendment clearly prohibits cruel and unusual punishments, it leaves unresolved who decides whether a punishment is cruel and unusual and by what standard—whether according to contemporary values or the Framers' understanding at ratification.

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[22] Congress is specifically authorized to punish "Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations." U.S. CONST., art. I, § 8, cl. 10. Impeachment is authorized "for, and conviction of, treason, bribery, or other high crimes and misdemeanors." *Id.*, art. II, § 4. The Constitution dedicates a specific section to treason. *See Id.*, art. III, § 3 (defining treason against the United States, proof requirements, and limits on Congress's power to punish treason).

[23] *See* OKLA. CONST., art. II, § 9A ("The death penalty provided for under [state] statutes shall not be deemed to be, or to constitute, the infliction of cruel or unusual punishments, nor shall such punishment be deemed to contravene any other provision of this Constitution."); FLA. CONST., art. 1, § 17 ("The death penalty is an authorized punishment for capital crimes designated by the legislature."); CAL. CONST., art. 1, § 27 ("The death penalty provided for under [state] statutes shall not be deemed to be, or to constitute, the infliction of cruel or unusual punishments within the meaning of Article 1, Section 6 nor shall such punishment for such offenses be deemed to contravene any other provision of this constitution."); MASS. CONST., amend. CXVI ("No provision of the Constitution, however, shall be construed as prohibiting the imposition of the punishment of death."). Despite constitutional authorization, Massachusetts abolished capital punishment.

[24] N.J. CONST., art. I, § 12 ("It shall not be cruel and unusual punishment to impose the death penalty on a person convicted of purposely or knowingly causing death or purposely or knowingly causing serious bodily injury resulting in death who committed the homicidal act by his own conduct or who as an accomplice procured the commission of the offense by payment or promise of payment of anything of pecuniary value."). Nevertheless, New Jersey abolished capital punishment.

[25] The Constitution frequently limits or creates exceptions to general rules based on the type or severity of the offense. See, e.g., U.S. CONST., art. III, § 2 (guaranteeing trial by jury "except in Cases of Impeachment."); *Id.*, art. II, § 2 (granting president pardon power except in cases of impeachment.); *Id.*, art. I, § 6 (privileges for congressional speech and debate exclude cases of treason, felony and breach of the peace); *Id.*, amend. V. (grand jury indictment required "for a capital, or otherwise infamous crime").

B. Contemporary Standards of Decency

Modern Eighth Amendment doctrine begins with *Trop v. Dulles* (1958),[26] in which the Court held that denationalization could not be imposed as punishment for desertion.[27] The Court held that it could not. Writing for the Court, Chief Justice Warren explained that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man."[28] The scope of "cruel and unusual" punishment depends on contemporary social values; punishments must meet "evolving standards of human decency."[29]

Following this approach, the list of crimes punishable by death remains consistent with national values. A state may not punish crimes such as vandalism, forgery, or perjury with death because a national consensus stands against inflicting capital punishment for those crimes. In enforcing these limits, the Court does not assess the seriousness of an offense or culpability of an offender but instead enforces national standards throughout the country.[30]

Despite controversy and criticism,[31] *Trop*'s general principle stands firm. The Court has repeatedly and consistently evaluated contemporary standards of decency to identify constraints imposed by the Eighth Amendment. In capital cases, the Court has avoided all-or-nothing conclusions. Applying the Eighth Amendment, it has excluded certain offenses and offenders from capital punishment.[32] The Court has held, for example, that states may not impose death sentences

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[26] Trop v. Dulles, 356 U.S. 86, 87 (1958)

[27] Albert Trop had deserted his unit during World War II, was court-martialed, imprisoned briefly, and dishonorably discharged. Years later, when he applied for a passport, he learned that Congress had enacted a statute providing that any soldier convicted of desertion automatically lost United States citizenship. *Id.* at 87-88.

[28] *Id.* at 100-01.

[29] *Id.* at 101.

[30] Some commentators criticize this level of judicial restraint. *See*, *e.g.*, Tonja Jacobi, *The Subtle Unraveling of Federalism: The Illogic of Using State Legislation as Evidence of an Evolving National Consensus*, 84 N.C. L. REV. 1089, 1113 (2005).

[31] *See* Kathryn E. Miller, *No Sense of Decency*, 98 WASH. L. REV. 115, 127-37 (2023) (surveying critical perspectives on the evolving standards of decency standard).

[32] *See*, *e.g.*, Atkins v. Virginia, 536 U.S. 304 (2002) (holding that Eighth Amendment prohibits execution of intellectually disabled offenders); Roper v. Simmons, 543 U.S. 551 (2005) (prohibiting execution of juvenile offenders); Thompson v. Oklahoma, 487 U.S. 815 (1988) (same).

for rape,[33] nor sentence a passive accomplice to death.[34] These decisions do not reflect moral or policy judgments about optimal punishment, but enforcement of national constitutional limits. Capital punishment is no longer as broadly available as it was at the Founding, but it remains constitutionally permissible for some crimes and offenders.[35] The central issue is not whether to apply evolving standards of decency, but how to define and identify them.[36]

1. Identified by State Laws

The search for evolving standards of decency that constrain government punishments begins by examining contemporary state laws. As the Court has explained, "the 'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.'"[37] The Court therefore compares how many states impose capital punishment for an offense or offender to how many do not.

If objective evidence demonstrates a consensus against a sentencing practice, the punishment fails to meet contemporary standards of decency and is therefore unconstitutional.[38] The question here is whether there is a clear national consensus against capital punishment for murder. States need not affirmatively demonstrate support for the death penalty to continue it; the relevant inquiry is whether a consensus has emerged against its use.

Focusing on state legislation reflects both democratic legitimacy and institutional restraint. State legislatures are well positioned to assess competing arguments about capital punishment,

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[33] *See Coker*, 433 U.S. at 597 (holding that Eighth Amendment prohibits capital punishment for the rape of an adult where the victim is not killed); *Kennedy*, 554 U.S. at 412 (prohibiting capital punishment for the non-fatal rape of a child).

[34] Enmund v. Florida, 458 U.S. 782 (1982).

[35] *See* Alli Katzen, *Why Justice Kavanaugh Should Continue Justice Kennedy's Death Penalty Legacy-Next Step: Expanding Juvenile Death Penalty Ban*, 74 U. MIAMI L. REV. 964 (2019) (arguing against capital punishment for offenders age twenty-five and under).

[36] This divide is evident in *Kennedy v. Louisiana*. After reviewing "objective evidence of contemporary values," the majority considers the purposes of punishment and its "own judgment" on the acceptability of a punishment. *See Kennedy*, 554 U.S. at 434. The dissent criticizes the majority for imposing policy judgments better suited to state legislatures. *Id.* at 461-62 (Alito, J., dissenting).

[37] *Atkins*, 536 U.S. at 312 (citations omitted); *Thompson*, 487 U.S. at 822 (emphasizing relevant legislative enactments).

[38] Miller v. Alabama, 567 U.S. 460, 494 (2012).

including public opinion, professional expertise, and international practice.[39] Public opinion may be fickle and subject to change, but state laws are difficult to change.[40] The prevailing approach recognizes that social values evolve without permitting judges to impose their value judgments on the states.[41] Surveying state laws and practices is meaningful but also manageable. Rather than independently weighing a wide range of potentially relevant sources, the Court relies on the considered judgments of the states.

This restrained emphasis on objective indicia likely commands the decisive votes on the current Court.[42] Chief Justice Roberts has repeatedly emphasized that the Court should judge standards of decency using objective evidence, primarily state laws and practices, and not impose subjective values and beliefs.[43] Justice Alito has likewise grounded his analysis of contemporary standards in a cautious reading of state laws and practices.[44] For these reasons, this Article emphasizes objective indicia of contemporary standards of decency.

2. Defined by Use and Practice

Although state statutes announce legal values, a purely textual survey can misrepresent actual social practice.[45] As is often said, actions can speak louder than words. States may reject a

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[39] *See* Penry v. Lynaugh, 492 U.S. 302, 335 (1989) (observing that public opinion regarding a punishment "may ultimately find expression in legislation, which is an objective indicator of contemporary values upon which we can rely.")

[40] "The enactment and implementation of any new death penalty statutes … imposes many costs." *Kennedy*, 554 U.S. at 451-52 (Alito, J., dissenting).

[41] *See Furman*, 408 U.S. at 465-70 (Rehnquist, J., dissenting) (criticizing judicial activism in death penalty context); *Roper v. Simmons*, 543 U.S. at 615-16 (Scalia, J., dissenting) (advocating "legislative primacy" in determining national consensus to avoid judicial imposition of moral judgments).

[42] Assuming the Court's three liberal Justices oppose capital punishment for murder and Justices Thomas and Gorsuch support it, the decisive votes belong to Justices who accept evolving standards of decency as measured by objective indicia, principally state laws and practices. As discussed in the text, Chief Justice Roberts and Justice Alito have advanced this intermediate position. The Eighth Amendment philosophies of Justices Barrett and Kavanaugh remain unsettled.

[43] *Miller*, 567 U.S. at 494-95 (Roberts, C.J., dissenting).

[44] *Id.* at 511-15 (Alito, J., dissenting) (emphasizing the need for objective indicia of national standards and observing that the "staple" of the inquiry has been "the tallying of the positions taken by state legislatures); *Kennedy*, 554 U.S. at 448-61 (Alito, J., dissenting) (arguing that the majority failed to assess current norms based on state legislation).

[45] The Court has observed that "simply counting [statutes] would present a distorted view" of contemporary standards of decency. *Miller*, 567 U.S. at 485.

punishment through prolonged non-use rather than formal repeal.[46] Accordingly, the Court considers not only what state law authorizes, but how states actually use the punishments they retain.

When assessing state laws, the Court takes note of clear legislative trends.[47] Recent enactments are more probative of contemporary values than policies adopted decades ago. States inherit existing codes, and some outdated provisions persist because they lack practical significance. Taking stock of legislative trends is like assessing current market values by recent transactions rather than past purchases.[48] One would assess an industry standard based on what consumers buy today, rather than what people have accumulated in their homes.[49]

When a substantial majority of states reject a punishment in law or practice, there is objective evidence of a national consensus against it. For purposes of this analysis, each state is counted equally; the Court does not weight states by population, geography, crime rates, or other factors.

3. Informed by Additional Considerations

Some judges and scholars treat evolving standards of decency as a question of informed conscience. Under this approach, state laws and practices remain the starting point, but the inquiry

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[46] *Thompson*, 487 U.S. at 822 (discussing public sentiment in the context of jury practices).

[47] *See Atkins*, 536 U.S. at 315 ("It is not so much the number of these States that is significant, but the consistency of the direction of change."); *Kennedy*, 554 U.S. at 455-57 (drawing inferences about contemporary standards from recent legislative developments).

[48] In real estate, the current value of homes is determined by recent comparable sales, not sales histories. *See* John Egan, *What Are Real Estate Comps?*, EXPERIAN (Nov. 14, 2022), https://www.experian.com/blogs/ask-experian/what-are-real-estate-comps.

[49] Although many consumers retain compact discs, online distribution through downloads and streaming has displaced CD sales. *See* Felix Richter, *The Rise and Fall of the Compact Disc*, STATISTA (Aug. 17, 2022), https://www.statista.com/chart/12950/cd-sales-in-the-us/. Once a standard feature in new automobiles, CD players are now largely obsolete. *See* Anthoni Oisin, *Why Did They Stop Putting CD Players in New Cars?*, SLASHGEAR (Aug. 7, 2025), https://www.slashgear.com/1928721/why-they-stopped-putting-cd-players-in-new-cars; John Feder, *These Are the Last Four Cars with CD Players in 2025*, THE DRIVE (Oct. 15, 2025), https://www.thedrive.com/news/these-are-the-last-four-cars-with-cd-players-in-2025.

may also be informed by public opinion polls,[50] the positions of professional organizations,[51] the experience of other developed nations,[52] and the moral justifications for capital punishment.

As a matter of informed conscience, some justices have maintained that capital punishment is inherently cruel and unusual, while others maintain society has proven incapable of administering capital punishment in a fair and dignified manner.[53] On the Roberts Court, three justices—Sotomayor, Kagan, and Jackson—have expressed skepticism about the constitutionality of capital punishment and have rejected its use in most cases.[54]

C. Originalist Perspectives

Originalism is not a single theory but a family of approaches that differ in how they identify constitutional meaning. Some would follow the Framers' original understanding of prohibited and acceptable punishments, but that archaic view is limited. The dominant modern form—original public meaning originalism—treats the Constitution as a legal text whose meaning was fixed at ratification by its public semantic content. The Amendment's original public meaning may be reflected in historical writings, legal treatises, founding-era law, and early judicial decisions that discuss the Amendment. Under this approach, constitutional meaning is not defined by the

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[50] *See*, *e.g.*, *Atkins*, 536 U.S. at 316 n. 21 (observing that public opinion surveys show a majority of American oppose executing intellectually disabled offenders); Charles W. Thomas, *Eighth Amendment Challenges to the Death Penalty: The Relevance of Informed Public Opinion*, 30 VAND. L. REV. 1005, 1013-16 (1977) (discussing the Court's analysis of public opinion data).

[51] *See Thompson*, 487 U.S. at 830-31 (taking note of the opinions of professional organizations and other developed nations); *Atkins*, 536 U.S. at 316 n. 21 (discussing opinions of professional organizations and public opinion polls).

[52] *See*, *e.g.*, *Roper v. Simmons*, 543 U.S. at 575-78 (observing that the United States is the only country that sentences juveniles to death); Graham v. Florida, 560 U.S. 48, 80-81 (2010) (reviewing sentencing practices of other nations); Harold Hongju Koh, *Paying Decent Respect to World Opinion on the Death Penalty*, 35 UC DAVIS L. REV. 1085 (2001); Freedman, *supra* note 9, at 1733-35 (discussing laws in other countries, the District of Columbia, and Indian territories).

[53] *See*, *e.g.*, Glossip v. Gross, 576 U.S. 863, 945-46 (2015) (Breyer, J., dissenting) (arguing that the death penalty is unconstitutional per se due to systemic defects that cannot be remedied); State v. Gregory, 427 P.3d 621, 636-37 (Wash. 2018) (holding that capital punishment is not unconstitutional per se, but that the state's capital punishment system has fatal flaws).

[54] *See* Phyllis Goldfarb, *Arriving Where We've Been: Death's Indignity and the Eighth Amendment*, 102 IOWA L. REV. ONLINE 386, 402 (2016) (describing Justices Sotomayor and Kagan as likely votes for abolishing the death penalty under the Eighth Amendment). Justice Jackson has expressed critical opinions in death penalty cases. *See*, *e.g.*, Chinn v. Shoop, 143 S. Ct. 28 (2022) (Jackson, J., dissenting from denial of certiorari); Michaels v. Davis, 144 S. Ct. 914 (2024) (same).

Framers' subjective intentions or expectations, by judicial preferences, or by modern usage.[55] Instead, this perspective asks what the Eighth Amendment meant to voters who ratified it.[56]

Originalists reject the evolving standards of decency framework.[57] The relevant standard for judging the constitutionality of punishments from the originalist perspective is not contemporary social values but whether the punishment intentionally inflicts unnecessary pain. These standards may produce similar readings, but the prohibition of unnecessary pain is not contingent on current social values.[58] Instead, we must identify the limiting principles that distinguish necessary punishments from unnecessary pain.

1. Original Public Meaning of Eighth Amendment

The original public meaning of "cruel and unusual" punishment is not markedly different from its contemporary meaning. As John Stinneford has shown, cruel originally meant "unjustly harsh,"[59] while unusual meant "contrary to long usage."[60] The meaning of these terms has not changed dramatically, if at all.[61] Cruel and unusual punishments inflict needless suffering—pain

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[55] *See* Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 105-08 (2001).

[56] *See*, *e.g.*, Harmelin v. Michigan, 501 U.S. 957, 976 (1991) "[T]he ultimate question is … what its meaning was to the Americans who adopted the Eighth Amendment.").

[57] *Miller*, 567 U.S. at 505-06 (Thomas, J., dissenting) (arguing that prior cases which required individualized death sentencing were wrongly decided); *Graham*, 560 U.S. at 102–06 (Thomas, J., dissenting) (same). Justice Gorsuch also emphasizes the original and historical understanding of the Eighth Amendment. *See*, *e.g.*, *Bucklew*, 587 U.S. at 129-30 (stating that so long as proper procedures are followed and the method of execution is not cruel or unusual, "the judiciary bears no license to end a debate reserved for the people and their representatives").

[58] To illustrate the difference, we can identify times when the prevailing standard of decency has endorsed gratuitous and violent punishments. At times, macabre spectacles like public tortures and executions have been popular entertainment. *See* DAVID GARLAND, PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION 33 (2010). The original principle prohibits torturous punishments, but contemporary standards of decency may permit torture. *See* Jamelle Bouie, *Dick Cheney's America: Of Course Americans Are OK with Torture. Look at How We Treat Our Prisoners*, SLATE (Dec. 16, 2014), https://slate.com/news-and-politics/2014/12/why-americans-support-torture-we-accept-the-abuse-and-cruel-punishment-of-our-prisoners.html.

[59] *See* John F. Stinneford, *The Original Meaning of "Cruel"*, 105 GEO. L.J. 441, 445-46 (2016).

[60] *See* John F Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U.L. REV. 1739 (2008); John F Stinneford, *Death, Desuetude, and Original Meaning*, 56 WM. & MARY L. REV. 531 (2014).

[61] A modern dictionary definition of "cruel" is "disposed to inflict pain or suffering**;** devoid of humane feelings; causing or conducive to injury, grief, or pain; unrelieved by leniency." *Cruel*, MERRIAM-WEBSTER DICTIONARY (2026), https://www.merriam-webster.com/dictionary/cruel. Today, unusual means "not normal or typical; different or strange in a way that attracts attention; uncommon, rare; extraordinary, remarkable." *Unusual*, MERRIAM-WEBSTER DICTIONARY (2026), https://www.merriam-webster.com/dictionary/unusual.

beyond that inherent in punishment itself. According to Justice Thomas, the Amendment prohibits "torturous punishments" that purposely cause additional pain.[62]

The Founders applied Eighth Amendment principles to define capital crimes in Founding Era. The Framers unquestionably regarded murder as a capital offense, and during the Founding Era "capital punishment was a common sanction in every State."[63] During the Founding Era, states punished a wide range of offenses with death, including morel crimes like blasphemy, adultery, and fornication.[64] For some originalists, the Framers' understanding of capital offenses ends the constitutional inquiry.[65] However, we should try to understand why the Founders made murder and other serious offenses punishable by death.

The Constitution does not expressly authorize capital punishment for murder, as some state constitutions do. Nor does it enumerate crimes with may be punishable by death in perpetuity. Rather than listing permissible punishments, the Constitution identifies their defining principle. The first Congress demonstrated how to use the constitutional principle to generate a list of capital crimes. It is important to distinguish methods from results, the clock from the time it tells. Faithful application of a method yields different results depending on what it is applied to. To obtain the same result every time, one must abandon the method; to freeze time, one must break the clock.

Consistent with the principle that is cruel to make crimes punishable by death when killing is unnecessary, the Founders removed death penalties from hundreds of offenses which were punishable by death before Independence. As colonists, the Founders lived under the British

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[62] *Bucklew*, 587 U.S. at 151 (Thomas, J., concurring); *see also Graham*, 560 U.S. at 99 (Thomas, J., dissenting) (arguing that the Eighth Amendment prohibits "torturous *methods* of punishment—specifically methods akin to those that had been considered cruel and unusual at the time the Bill of Rights was adopted.") (emphasis in original).

[63] *Gregg*, 428 U.S. at 177; Sheherezade C. Malik & D. Paul Holdsworth, *A Survey of the History of the Death Penalty in the United States*, 49 U. RICH. L. REV. 693, 695 (2014).

[64] Early American capital punishment was broad by modern standards, encompassing moral and economic crimes well beyond today's understanding of serious offenses. *See* LOUIS P. MASUR, RITES OF EXECUTION: CAPITAL PUNISHMENT AND THE TRANSFORMATION OF AMERICAN CULTURE, 1776-1865 4-5 (1989); LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 41-42 (1993) (observing that colonies made moral offenses punishable by death but did so sparingly).

[65] Some originalists maintain that so long as the state does not inflict unnecessary pain in the execution process, it may impose capital punishment for any offense that was punishable by death at the Founding—even if no other state does so today. *See* Stinneford, *supra* note 60, at 540-45 (discussing Antonin Scalia's perspective on Eighth Amendment); Craig S. Lerner, *Justice Scalia's Eighth Amendment Jurisprudence: The Failure of Sake-of-Argument Originalism*, 42 HARV. J.L. & PUB. POL'Y 91 (2019).

Monarchy's "Bloody Code" which made hundreds of offenses "worthy of instant death."[66] The Code made petty property punishable by death to protect the King's royal forests.[67] Colonists could be executed for conduct such as damaging orchards, cutting trees, stealing rabbits, or destroying fishponds, fences, or hedges. The Crown used capital punishment expansively and as an instrument of domination.[68] The Founders were revolted not only by the gruesome spectacle of the Crown's punishments, but also by the expansive list of capital offenses.[69]

The Colonies declared independence, in part, to escape the British monarch's abuse of judicial power and protect the dignity of man.[70] After declaring independence from Britain, American states dramatically decreased the number of capital offenses.[71] The Founders did not accept or maintain the enumeration of capital crimes that was common and traditional in their

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[66] Under English common law, Blackstone observed that capital punishment was "inflicted (perhaps inattentively) by a multitude of successive independent statutes, upon crimes very different in their natures. It is a melancholy truth, that among the variety of actions which men are daily liable to commit, no less than an [sic] hundred and sixty have been declared by Act of Parliament to be felonious without benefit of clergy; or, in other words, to be worthy of instant death." BLACKSTONE, *supra* note 15, at *18.

[67] *See* Lizzie Seal, *Criminalisation and the Eighteenth-Century's "Bloody Code"*, CTR. FOR CRIME & JUST. STUD. (July 25, 2016), https://www.crimeandjustice.org.uk/publications/cjm/article/criminalisation-and-eighteenth-centurys-bloody-code; Leon Radzinowicz, *The Waltham Black Act: A Study of the Legislative Attitude Towards Crime in the Eighteenth Century*, 9 CAMBRIDGE L. J. 56, 61-67 (1945) (enumerating capital offenses for appearing with blackened face or in disguise, hunting deer, stealing hares, taking fish, destroying fish ponds, cutting down trees, killing cattle, and setting fires).

[68] *Id.* at 72-74; Douglas Hay, *Crime and Justice in Eighteenth-and Nineteenth-Century England*, 2 CRIME & JUST. 45 (1980).

[69] Edmund Pendleton, the first speaker of the Virginia House of Delegates, expressed this view in a letter to Thomas Jefferson one month after the Declaration of Independence: "Our Criminal System of Laws … has hitherto been too Sanguinary, punishing too many crimes with death, I confess, and could wish to see that changed for some other mode of Punishment in most cases[.]" *Edmund Pendleton to Thomas Jefferson, 10 August, 1776*, NAT'L ARCHIVES, https://founders.archives.gov/documents/Jefferson/01-01-02-0204. *See also* Deborah A. Schwartz & Jay Wishingrad, *The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the Weems v. United States Excessive Punishment Doctrine*, 24 BUFF. L. REV. 783 (1974); David J. Rothman, *Perfecting the Prison: United States, 1789-1865*, *in* THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY 102-03, (Norval Morris & David J. Rothman eds., 1995).

[70] *See* Joseph H. Smith, *An Independent Judiciary: The Colonial Background*, 124 U. PENN. L. REV. 1104, 1104-05 (1976); STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 90-99 (2002); CAROL S. STEIKER & JORDAN M. STEIKER, COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT 9-10 (2016).

[71] FRIEDMAN, *supra* note 64, at 73-74; Malik & Holdsworth, *supra* note 63, at 696; BANNER, *supra* note 70, at 89.

time.[72] American lawmakers narrowed death eligibility, particularly for property crimes, and relied, where feasible, on nonlethal sanctions that punished offenders without destroying families and communities.[73] Someone voting to ratify the Eighth Amendment would understand that it requires a restrained approach to punishment. "In the Founding Fathers' time, talk of 'sanguinary' laws and practices—and the need to reform and replace them … was everywhere, especially on the tongues of American revolutionaries and other intellectuals."[74]

They did not reject capital punishment categorically, but "on the whole, hated the death penalty"[75] and limited its use. Thomas Jefferson described capital punishment as the "last melancholy resource" against those whose existence is inconsistent with public safety.[76] Benjamin Franklin warned that executing someone for an offense that "does not deserve Death" is "Murder."[77] William Bradford, attorney general for George Washington, observed, "That these punishments ought to be greatly lessened, if not totally abolished, is the opinion of many of the most enlightened men in America[.]"[78] Benjamin Rush observed that cruel monarchs kill their subjects without compunction:

> [C]apital punishments are the natural offspring of monarchical governments. ... Kings consider their subjects as their property: no wonder, therefore, they shed their blood with as little emotion as men shed the blood of their sheep or cattle. But the principles of republican governments speak a very different language. They teach us the absurdity of the divine origin of kingly power. ... They appreciate human life, and increase public and private obligations to preserve it. ... The United States have adopted these peaceful and benevolent forms of government. … An execution in a republic is

[72] FRIEDMAN, *supra* note 64, at 63, 73; Rob Warden & Daniel Lennard, *Death in America Under Color of Law: Our Long, Inglorious Experience with Capital Punishment*, 13 NW. J.L. & SOC. POL'Y 194 (2017); Erin E. Braatz, *The Eighth Amendment's Milieu: Penal Reform in the Late Eighteenth Century*, 106 J. CRIM. L. & CRIMINOL. 405 (2016).

[73] *See* Mugambi Jouet, *Revolutionary Criminal Punishments: Treason, Mercy, and the American Revolution*, 61 AM. J. LEGAL HIST. 139 (2021) (documenting Founders' relatively merciful approach to prosecuting crimes against the nation).

[74] STEIKER & STEIKER, *supra* note 70, at 10.

[75] FRIEDMAN, *supra* note 64, at 63.

[76] *See* Thomas Jefferson, *A Bill for Apportioning Crimes and Punishments in Cases Heretofore Capital, 18 June 1779*, NAT'L ARCHIVES, https://founders.archives.gov/documents/Jefferson/01-02-02-0132-0004-0064.

[77] *Benjamin Franklin to Benjamin Vaughan, 14 March 1785*, NAT'L ARCHIVES, https://founders.archives.gov/documents/Franklin/01-43-02-0335.

[78] William Bradford, *An Enquiry How Far the Punishment of Death is Necessary in Pennsylvania (1793)*, reprinted in 12 AM. J. LEGAL HIST. 122, 133 (1968).

> like a human sacrifice in religion. It is an offering to monarchy, and to that malignant being, who has been styled a murderer from the beginning, and who delights equally in murder, whether it be perpetrated by the cold, but vindictive arm of the law, or by the angry hand of private revenge.[79]

Consistent with the principles articulated by Founding Era writers and legislators, the Eight Amendment permits capital punishment as a last resort. Cruel and unusual punishments may terrify subjects into obedience and exact vengeance on criminals but were nevertheless prohibited by a nation committed to revolutionary values.

2. Who is Protected from Unnecessary Pain and Suffering?

The Eighth Amendment categorically prohibits "cruel and unusual punishments" that inflict unnecessary pain. This observation begs the question: Who is protected from unnecessary suffering? Modern Eighth Amendment addressing execution methods focus on the offender's sensation of physical pain, but the Eighth Amendment protects others, including the offender's family as well as those who administer and witness punishments from needless suffering.

The Eighth Amendment embodies the Founders' enlightened principles of government which sharply contrast with how punishments are inflicted in monarchies. Monarchs inflict cruel and unusual punishments on their subjects to compel obedience; they punish offenders more than necessary without regard for the consequences. Eminent scholars, whose works were widely read by in the Founding Era, observed that cruel punishments have devastating consequences for the offender's dependents. "Can there be a more melancholy spectacle," Beccaria asked, "than a whole family, overwhelmed with infamy and misery, from the crime of their chief?"[80] Montesquieu similarly warned that punishments such as confiscations "strip innocent children" and "destroy a whole family," undermining "the very soul" of republican government.[81] Where possible, an offender should be sent to a workhouse, rather than the gallows, so they may repay their debts through labor rather than be removed from the world entirely.[82]

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[79] BENJAMIN RUSH, CONSIDERATIONS ON THE INJUSTICE AND IMPOLICY OF PUNISHING MURDER BY DEATH 18 (1792).

[80] CESARE BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENTS *91 (1767).

[81] BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS, bk. 5, § 15 (1748).

[82] Consistent with this view, some offenders were permitted or required to work during the day to provide for their families and repay their debts while incarcerated. *See* Randolph Roth, *"Blood Calls for Vengeance!": The History of Capital Punishment in Vermont*, 65 PROC. VT. HIST. SOC'Y 10 (1997).

Someone voting to ratify the Eighth Amendment would understand that it prohibits inflicting pain and suffering on the offender's family as well as those who administer and witness punishments. The same limiting principle appears in constitutional bans on bills of attainder and related practices of corruption of blood and forfeiture.[83] No matter how serious the crime, the state should not make the offender's innocent relatives suffer.[84] Even for the crime of treason, the Constitution protects the offender's innocent heirs from additional suffering:

> What was intended by the constitutional provision is free from doubt. In England, attainders of treason worked corruption of blood and perpetual forfeiture of the estate of the person attainted, to the disinherison [sic] of his heirs, or of those who would otherwise be his heirs. Thus innocent children were made to suffer because of the offence of their ancestor. When the Federal Constitution was framed, this was felt to be a great hardship, and even rank injustice. For this reason, it was ordained that no attainder of treason should work corruption of blood or forfeiture, except during the life of the person attainted. No one ever doubted that it was a provision introduced for the benefit of the children and heirs alone; a declaration that the children should not bear the iniquity of the fathers.[85]

The offender is responsible for his crimes and may be punished, but Constitution prohibits punishments that extend to the offender's family.[86]

Some voting to ratify the Eighth Amendment would understand that it prohibits unnecessary killings because Founding Era practices reflect this principle. The common law rule of self-defense authorized the use of deadly force only as a last resort, when necessary to prevent imminent death or grievous bodily harm, and only after safe retreat was no longer possible.[87] This

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[83] *See* U.S. CONST., art. I, § 9, cl. 3 ("No Bill of Attainder … shall be passed."); *Id.*, § 10, cl. 1 ("No state shall … pass any Bill of Attainder[.]"); *Id.*, art. III, § 3, cl. 2 ("The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.").

[84] *See* Max Stier, *Corruption of Blood and Equal Protection: Why the Sins of the Parents Should Not Matter*, STAN. L. REV. 727 (1992).

[85] Wallach v. Van Riswick, 92 U.S. 202, 210 (1876).

[86] *See* Nicholas Serafin, *The Corruption of Blood as Metaphor*, 84 MD. L. REV. 597, 608-09 (2024) (discussing writings by William Blackstone, James Madison, and James Wilson on the "egregious" and "pernicious" nature of intergenerational punishments).

[87] WILLIAM BLACKSTONE, 3 COMMENTARIES ON THE LAWS OF ENGLAND *3-4 (1768) (discussing self-defense as "the primary law of nature" and warning that force should not exceed necessity for defense); Saul Cornell, *The Founders'*

principle is reflected in how the Founders conducted the Revolutionary War.[88] During the War, Americans invoked the law of nations to reject killing enemy soldiers once surrendered or captured.[89] As General, George Washington repeatedly ordered humane treatment of prisoners; captured British and Hessians were detained rather than executed.[90] In contrast, American prisoners of war received cruel and barbarous treatment from the King's army.[91]

The Founders prohibited torturous punishments not only to protect the offender, but to protect society as well. They accepted that capital punishment may be necessary but rejected the spectacle of the King's bloody, torturous punishments. What makes a monarch's gratuitous display of power cruel is not the killing, which may be justified, but its harmful effect on society.[92] Crowds may gather to watch public execution rituals, but the prevailing ethic viewed gratuitous cruelty, public degradation, and theatrical violence as hallmarks of despotic rule and incompatible with

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Common Law and Bruen's Text, History, and Tradition Test: From History 'Lite'to History Right, 73 BUFFALO L. REV. 651, 665-67 (2025).

[88] *See* William Ossipow & Dominik Gerber, *The Reception of Vattel's Law of Nations in the American Colonies: From James Otis and John Adams to the Declaration of Independence*, 57 AM. J. LEGAL HIST. 521 (2017).

[89] *See* Ken Miller, *"A Dangerous Set of People": British Captives and the Making of Revolutionary Identity in the Mid-Atlantic Interior*, 32 J. EARLY REPUBLIC 565 (2012); Laura L. Becker, *Prisoners of War in the American Revolution: A Community Perspective*, 46 MILITARY AFFAIRS 169 (1982).

[90] *See*, *e.g.*, George Washington, *Orders to Lt. Col. Samuel Blachley, 8 Jan. 1777*, NAT'L ARCHIVES, https://founders.archives.gov/documents/Washington/03-08-02-0017 ("Treat them with humanity, and Let them have no reason to Complain of our Copying the brutal example of the Brittish [sic] Army in their Treatment of our unfortunate bretheren who have fallen into their hands").

[91] *See* Matthew Wills, *Revolutionary Atrocity*, JSTOR DAILY (Aug. 29, 2023), https://daily.jstor.org/revolutionary-atrocity/; David Dzurec, *Prisoners of War and American Self-Image During the American Revolution*, 20 WAR IN HISTORY 430 (2013); T. Cole Jones, *"The Dreadful Effects of British Cruilty": The Treatment of British Maritime Prisoners and the Radicalization of the Revolutionary War at Sea*, 36 J. EARLY REPUBLIC 435 (2016). There is, of course, a difference between an enemy soldier, who is following orders, and a criminal, who disobeys the law. While he urged the humane treatment of prisoners of war, Washington executed traitors and spies.

[92] *See*, *e.g.*, BLACKSTONE, *supra* note 15, at *369-70 (describing inhumane and disgusting punishments); BECCARIA, *supra* note 80, at *112-13 (observing the pernicious effect of capital punishment on social values).

republican government.[93] The death penalty also degrades those required to carry it out.[94] The executioner is stigmatized, isolated, and traumatized by the act the law requires him to perform.[95] Punishment is legitimate only insofar as it is necessary and morally instructive—punishment is not for popular entertainment or vengeance.[96]

These observations are not meant to suggest that the Founders rejected execution for murder. They believed murderers deserved death. The point is to identify the *principle* that guided their enumeration of capital offenses. Why did eliminate most capital crimes but continue to make some punishable by death? As discussed, democratic governments kill only when necessary. The modern question is therefore not whether the Founders expected murder to remain capital, but whether the original principle still justifies execution when the offender can be securely confined.

This articulation of Eighth Amendment's original meaning does not impose any proportionality requirement. Traditional proportionality review asks how much punishment is appropriate given the severity of the offense. [97] Proportionality review may intrude on normative and policy issues better suited to legislatures.[98] The argument here is different. The Eighth

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[93] Public hangings were nevertheless common in the Founding Era and did not go out of favor until the 1830s. *See* FRIEDMAN, *supra* note 64, at 75-76. Public hangings emphasized moral instruction rather than gratuitous violence. Public hangings were typically conducted as solemn, highly ritualized events rather than spectacles of prolonged suffering. The condemned was brought to the gallows before a gathered crowd, a warrant or sermon was read, final words or prayers were offered, and death was intended to occur quickly. *See* BANNER, *supra* note 70, at ch. 2 (describing "hanging day"); MASUR, *supra* note 64, at ch. 2 (describing public executions in early America).

[94] *See* BECCARIA, *supra* note 80, at *113 (observing public contempt and indignation for the innocent executor of the public will).

[95] *See* Christopher Bennett, *Considering Capital Punishment as a Human Interaction*, 7 CRIM. L. & PHIL. 367, 374-77 (2013); Michael J. Osofsky et al., *The Role of Moral Disengagement in the Execution Process*, 29 LAW & HUM. BEHAV. 371 (2005) (reporting that executioners suffer moral disengagement and dehumanization); Robert T. Muller, *Prison Executioners Face Job-Related Trauma*, PSYCH. TODAY (Oct. 11, 2018), https://www.psychologytoday.com/us/blog/talking-about-trauma/201810/prison-executioners-face-job-related-trauma;

[96] *See* BECCARIA, *supra* note 80, at *106-07. Similarly, post-mortem punishments are cruel even though they inflict no physical pain on the deceased offender. *See* Allison Meier, *When Dissection Was a Criminal Punishment Worse Than Death*, HYPERALLERGIC (Mar. 7, 2017), https://hyperallergic.com/the-power-of-the-criminal-corpse/; RACHEL E. BENNETT, CAPITAL PUNISHMENT AND THE CRIMINAL CORPSE IN SCOTLAND, 1740–1834 161-65 (2017) (discussing the effect of death with dissection on offender's family members).

[97] This proportionality inquiry is often described as "traditional proportionality review" as well as "case-specific proportionality." Fry v. Lopez, 447 P.3d 1086, 1096 (NM 2019).

[98] Justice Thomas contends that the Eighth Amendment does not impose any substantive limits on the severity of punishments imposed on a particular class of offender or for specific offenses. *See Miller*, 567 U.S. at 503-04 (Thomas, J., dissenting) (arguing that the Eighth Amendment does not contain a "proportionality principle").

Amendment's prohibition against inflicting unnecessary pain does not vary in proportion to offense or offender. Regardless of how much the offender must be punished, the state may not inflict *unnecessary* pain and suffering on his children. The line is clear: the offender may deserve punishment; his innocent relatives do not. When the state can achieve legitimate ends without inflicting additional suffering on family members, imposing that additional suffering is cruel.

II. CAPITAL PUNISHMENT FOR MURDER FAILS TO MEET CONTEMPORARY STANDARDS OF DECENCY

This Part applies the Supreme Court's contemporary standards of decency framework to capital punishment for murder. Under settled Eighth Amendment doctrine, the Court evaluates whether a punishment is cruel and unusual by examining objective indicia of national values, with particular emphasis on state legislation and sentencing practices. Although the relevant data are largely undisputed, their constitutional significance requires careful analysis. When existing precedent is applied to current patterns of abolition, nonuse, and sentencing rarity, the evidence demonstrates that capital punishment for murder no longer accords with contemporary standards of decency.

A. State Laws

When the Constitution was ratified, all states authorized capital punishment. Since then, state laws have passed through several phases. The first wave of abolition occurred in the nineteenth century. Michigan abolitions the death penalty in 1846.[99] Wisconsin repealed it in 1853 after building the state's first prison.[100] Spurred by botched executions and fears of wrongful convictions, Maine abolished capital punishment in 1887.[101]

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[99] Michigan abolished capital punishment in 1846. *See* James H. Lincoln, *The Everlasting Controversy: Michigan and the Death Penalty*, 33 WAYNE L. REV. 1765, 1777-78 (1986); Eugene G. Wanger, *Historical Reflections on Michigan's Abolition of the Death Penalty*, 13 T.M. COOLEY L. REV. 755 (1996).

[100] *See* E. Michael McCann, *Opposing Capital Punishment: A Prosecutor's Perspective*, 79 MARQ. L. REV. 649, 705 (1995); *see also* Melanie Conklin, *Wisconsin: First to Kill the Death Penalty*, WISC. EXAMINER (Aug. 1, 2019), https://wisconsinexaminer.com/2019/08/01/wisconsin-first-to-kill-the-death-penalty; JOHN F. GALLIHER et al., AMERICA WITHOUT THE DEATH PENALTY: STATES LEADING THE WAY 31-52 (2002).

[101] *See* Edward Schriver, *Reluctant Hangman: The State of Maine and Capital Punishment, 1820-1887*, 63 NEW ENGLAND Q. 271, 285 (1990); GALLIHER et al., *supra* note 100, at 60-61.

Five more states abolished capital punishment before *Furman*. Minnesota abolished capital punishment in 1911 after a widely reported botched execution.[102] Alaska abolished capital punishment in 1957, two years before statehood, after hanging two Black men who may have been innocent.[103] Hawaii also abolished capital punishment in 1957, when a multiracial coalition won control of the territorial legislature and eliminated a penalty imposed almost exclusively on nonwhite defendants.[104] Oregon voters passed a constitutional amendment abolishing capital punishment in 1964.[105] Drawing on support for abolition among Quakers and Unitarians, Iowa abolished capital punishment in 1965.[106] West Virginia also abolished capital punishment in 1965.[107]

When *Furman* was decided, forty-one states authorized capital punishment and nine states did not. *Furman* forced states to revise or abandon their statutes , and the legislative response signaled broad support for capital punishment. Thirty-four states and the District of Columbia promptly revised their death-penalty laws to reinstate capital punishment.[108] Five more states,

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[102] *See* John D. Bessler, *The Midnight Assassination Law and Minnesota's Anti-Death Penalty Movement, 1849-1911*, 22 WM. MITCHELL L. REV. 577, 700-01 (1996); JOHN D. BESSLER, LEGACY OF VIOLENCE: LYNCH MOBS AND EXECUTIONS IN MINNESOTA 161-82 (2003) (discussing abolition of capital punishment in Minnesota).

[103] *See* Yvonne Krumrey, *Why Hasn't Alaska Executed Anyone Since Statehood? Juneau's Last Hangings May Be the Reason*, ALASKA PUBLIC MEDIA (May 15, 2024), https://alaskapublic.org/news/2024-05-15/why-hasnt-alaska-executed-anyone-since-statehood-juneaus-last-hangings-may-be-the-reason; Averil Lerman, *The Trial and Hanging of Nelson Charles*, 13 ALASKA JUST. F. 1 (1996).

[104] *See* Jonathan Okamura, *This 1948 Death Penalty Case Shows How Multiracial Coalitions Can Promote Change*, HONOLULU CIVIL BEAT (April 9, 2023), https://www.civilbeat.org/2023/04/jonathan-okamura-this-1948-death-penalty-case-shows-how-multiracial-coalitions-can-promote-change; Joseph Theroux, *Short History of Hawaiian Executions, 1826-1947*, 25 HAW. J. HIST. 147 (1991) (noting that only one of seventy-five persons executed for murder in Hawaii before abolition was white).

[105] *See* Hugo A. Bedau, *Capital Punishment in Oregon*, 45 OR. L. REV. 1 (1965).

[106] *See* Jerry Harrington, *Iowa's Capital Punishment Ban Owes Its Origin to Harold Hughes*, DES MOINES REG. (Jan. 9, 2017), https://www.desmoinesregister.com/story/opinion/columnists/iowa-view/2017/12/21/iowas-capital-punishment-ban-owes-its-origin-harold-hughes/962619001/; Dick Haws, *Remember Iowa's History Before Seeking Capital Punishment*, DES MOINES REG. (Jan. 9, 2017), https://www.desmoinesregister.com/story/opinion/columnists/iowa-view/2017/01/09/remember-iowas-history-before-seeking-capital-punishment/96354402/.

[107] *See* W. VA. § 61-11-2 (abolishing capital punishment); *see also* Hoppy Kercheval, *Shifting Attitudes on the Death Penalty*, WV METRO NEWS (Nov. 19, 2024), https://wvmetronews.com/2024/11/19/shifting-attitudes-on-the-death-penalty (noting that repeated attempts to reinstate capital punishment in West Virginia have gone nowhere).

[108] *See Gregg*, 428 U.S. at 179-80; Elaine McArdle, *The End of the Death Penalty? "Unintended Consequences" and the Legacy of Furman v. Georgia*, HARVARD L. BULL. (Feb. 14, 2023), https://hls.harvard.edu/today/the-end-of-the-death-penalty.

Kansas,[109] Massachusetts,[110] New Mexico,[111] New Jersey,[112] and Washington,[113] reinstated it later. Two former death-penalty states, North Dakota[114] and Vermont,[115] did not reinstate capital punishment.

Of the nine states *without* capital punishment in 1972, only Oregon later adopted a death penalty. Voters reinstated the death penalty by ballot measure in 1978.[116] Three years later, the Oregon Supreme Court struck down the law.[117] In 1984, Oregon voters reinstated it once more.[118]

By the end of the twentieth century, forty states had enacted death-penalty statutes. This was not merely symbolic. In 1986, states imposed 349 death sentences;[119] in 1999, there were 98

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[109] Kansas enacted a death penalty statute in 1935 but did not reinstate its death penalty until 1994. *See* James M. Galliher & John F. Galliher, *"Deja Vu All Over Again:" The Recurring Life and Death of Capital Punishment Legislation in Kansas*, 44 SOC. PROBLEMS 369 (1997). Kansas has not abolished the death penalty but has not sentenced anyone to death this decade.

[110] Massachusetts enacted a capital punishment statute in 1979 which was subsequently declared unconstitutional. *See* Dist. Att'y for the Suffolk Dist. v. Watson, 411 N.E.2d 1274 (Mass. 1980).

[111] New Mexico reinstated the death penalty in 1979. *See Fry v. Lopez*, 447 P.3d at 1095, 98 (discussing legislative history and noting that the state executed only one person under modern statute).

[112] New Jersey reinstated capital punishment in 1982. *See* State v. Ramseur, 106 N.J. 123, 156-57 (1987).

[113] In 1975, Washington voters reinstated capital punishment through a ballot Initiative; subsequent state legislation was later struck down by the state's supreme court. *See* State v. Green, 588 P.2d 1370, 1378 (Wash. 1981). After the voter-approved scheme was invalidated, the legislature enacted a new death penalty statute that was also struck down by the state's supreme court. *See Gregory*, 427 P.3d at 628-29.

[114] In 1915, North Dakota abolished the death penalty for all crimes except treason and the killing of a corrections officer; North Dakota's narrow death sentence was invalidated by *Furman*. *See* Hon. Dale Sandstrom, *Four Capital Murder Trials Since the Last Execution in 1905*, STATE OF N.D. CTS. (Sept. 7, 2006), https://www.ndcourts.gov/about-us/history/four-capital-murder-trials-since-the-last-execution-in-1905.

[115] In 1965, the Vermont Legislature eliminated the death penalty for murder, restricting capital punishment to treason, the killing of a law enforcement officer, and killing by someone previously convicted of murder. *See* Roth, *supra* note 82, .

[116] *See* Stephen Kanter, *Dealing with Death: The Constitutionality of Capital Punishment in Oregon*, 16 WILLAMETTE L. REV. 1 (1979).

[117] *See* State v. Quinn, 623 P.2d 630, 639-43 (Or. 1981).

[118] *See* William R. Long, *A Tortured Mini-History: The Oregon Supreme Court's Death Penalty Jurisprudence in the 1990s*, 39 WILLAMETTE L. REV. 1 (2003).

[119] *See Death Penalty Census Database*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/facts-and-research/data/death-penalty-census/sentences?year=1986 (last visited Jan. 19, 2026).

executions.[120] Public support tracked these laws and practices: 70 to 80 percent of Americans favored the death penalty for murder during this period.[121]

A few states nevertheless abolished capital punishment during the 1970s and 1980s. North Dakota officially abolished capital punishment in 1973.[122] The District of Columbia abolished capital punishment in 1981.[123] Rhode Island followed suit in 1984.[124] Vermont abolished capital punishment in 1987.[125] Despite these countercurrents, state laws and practices in the late twentieth-century demonstrated a national consensus in favor of capital punishment for murder.

With the benefit of hindsight, the late twentieth century appears unusually punitive.[126] The surge in death sentences, executions, and public support reflected the political and media

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[120] *See Execution Database*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/facts-and-research/data/executions?year=1999 (last visited Jan. 29, 2026).

[121] *See Historical Trends: Death Penalty*, GALLUP (n.d.), https://news.gallup.com/poll/1606/death-penalty.aspx.

[122] North Dakota officially repealed its narrow capital punishment statute in 1973. *See* Sandstrom, *supra* note 114.

[123] The District of Columbia Death Penalty Repeal Act of 1980 was adopted and signed in 1980, abolishing the district's death penalty as of 1981. *See* D.C. Law 3-113, https://code.dccouncil.gov/us/dc/council/laws/3-113. President Trump has urged federal prosecutors to pursue the death penalty for killings in D.C. under federal law. *See* Alex Woodward, *Trump Seeks 'Capital, Capital Punishment' for 'Anybody' Who Kills in DC, Where Death Penalty Is Banned*, THE INDEPENDENT (Aug. 26, 2025), https://www.independent.co.uk/news/world/americas/us-politics/trump-death-penalty-washington-dc-murder-b2814498.html.; Martin Austermuhle, *Capital Punishment: What It Means that Trump Reinstated the Death Penalty in D.C.*, THE 51ST (Oct. 2, 2015), https://51st.news/trump-reinstate-dc-death-penalty-murder-charges/.

[124] In 1973, Rhode Island reinstated the death penalty to punish murder in state prisons. Six years later, the state's supreme court struck down the law as a cruel and unusual punishment. *See* State v. Cline, 397 A. 2d 1309 (RI 1979). In 1984, the legislature officially repealed the state's death penalty. *See* Zach Howard, *U.S. Prosecutors to Seek Death Penalty in Rhode Island Shooting*, REUTERS (June 18, 2012), https://www.reuters.com/article/world/uk/us-prosecutors-to-seek-death-penalty-in-rhode-island-shooting-idUSBRE85H1N4/. Rhode Island's last execution took place in 1847; the man executed, John Gordon, was likely innocent and was posthumously pardoned. *See Governor Lincoln D. Chafee Pardons John Gordon*, OFFICE OF GOVERNOR (Jun. 26, 2011), https://www.ri.gov/press/view/14182.

[125] *See* Roth, *supra* note 82, at 22.

[126] *See*, *e.g.*, FRANKLIN E. ZIMRING, THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT 144-45 (2003) (situating the death penalty's resurgence as political performance in the "tough-on-crime" turn of 1990s).

environment of that era. [127] It is now widely treated as an anomaly in the arc of American penal history.[128]

Times have changed. For a variety of reasons, the tide has turned against capital punishment for murder in the twenty-first century. Support for capital punishment has undergone what one scholar describes as a "sudden and profound withering."[129] The legislative trend has run entirely toward abolition: states that have acted this century have abolished the death penalty, and no state has enacted or reinstated it.[130]

State activity since 2000 provides objective evidence of contemporary values. New York attempted to reinstate the death penalty,[131] but the state's supreme court struck down the state's death penalty statute in 2004,[132] and the legislature has not reinstated capital punishment.[133] New

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[127] *See* Samuel R. Gross, *The Death Penalty, Public Opinion, and Politics in the United States*, 62 ST. LOUIS U.L.J. 763, 770-71 (2017) (arguing that high public support for the death penalty in 1980s and 1990s spike reflected political competition to appear tough on crime); KATHERINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS 79-88 (1999) (discussing the political appeal of "tough-on-crime" rhetoric in late twentieth century); KATHERINE BECKETT & THEODORE SASSON, THE POLITICS OF INJUSTICE: CRIME AND PUNISHMENT IN AMERICA 60-71 (2d ed. 2004) **(**discussing the politics of the "war on drugs" in the 1980s and 1990s); DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 193-206 (2001) **(**explaining the "culture of control" that emerged in the 1980s and 1990s as product of neoliberal insecurity and politicized fear of disorder).

[128] BANNER, *supra* note 70, at 282-84 (identifying the late twentieth century as a distinct era of renewed enthusiasm for capital punishment linked to fear of crime, drugs, and social change); Heather Schoenfeld, *The War on Drugs, the Politics of Crime, and Mass Incarceration in the United States*, 15 J. GENDER RACE & JUST. 315, 345-48 (2012) (discussing lasting effect of late twentieth century punitiveness).

[129] Carol S. Steiker & Jordan M. Steiker, *The Rise, Fall, and Afterlife of the Death Penalty in the United States*, 3 ANN. REV. CRIMINOL. 299, 300 (2020).

[130] *See* State v. Santiago, 122 A.3d 1, 50-51 (Conn. 2015) (observing legislative trend against capital punishment).

[131] New York's discretionary death penalty statute was effectively invalidated by *Furman*. *See* People v. Fitzpatrick, 300 N.E.2d 139, 145-46 (N.Y. 1973). Following *Furman*, New York enacted mandatory death sentences for murdering a police officer or committing murder in prison while serving a life sentence. *See* Deborah L. Heller, *Death Becomes the State: The Death Penalty in New York State-Past, Present and Future*, 28 PACE L. REV. 589 (2007). The state's mandatory death sentences were struck down by the New York Court of Appeals. *See* People v. Smith, 63 N.Y.2d 41, 78-79 (1984).

[132] New York reinstated the death penalty in 1995, but the New York Court of Appeals held that the statute's jury-deadlock provision coerced death verdicts in violation of due process and the State Constitution. *See* People v. LaValle, 817 N.E.2d 341 (N.Y. 2004). In 2007, the court made clear no defendant could be sentenced to death under existing law. *See* People v. Taylor, 878 N.E.2d 969 (N.Y. Ct. App. 2007).

[133] *See* Carol S. Steiker & Jordan M. Steiker, *Little Furmans Everywhere: State Court Intervention and the Decline of the American Death Penalty*, 107 CORNELL L. REV. 1621, 1629-32 (2021); James R Acker, *Be Careful What You Ask For: Lessons from New York's Recent Experience with Capital Punishment*, 32 VT. L. REV. 683 (2007); James R.

Jersey abolished the death penalty in 2007, citing both excessive cost and the sanctity of life.[134] New Mexico abolished capital punishment in 2009.[135]

More states repudiated capital punishment in the 2010s. Illinois abolished capital punishment in 2011.[136] Connecticut repealed it in 2012.[137] Maryland ended capital punishment in 2013.[138] Massachusetts formally abolished its death penalty in 2014.[139] Nebraska's legislature abolished the death penalty in 2015; voters, however, reinstituted capital punishment via referendum the following year.[140] New Hampshire abolished its death penalty in 2019.[141]

Acker, *When the Cheering Stopped: An Overview and Analysis of New York's Death Penalty Legislation*, 17 PACE L. REV. 41 (1996).

[134] New Jersey's 2007 legislative repeal was accompanied by commutation of all eight pending death sentences to life without parole. *See* Aaron Scherzer, *The Abolition of the Death Penalty in New Jersey and Its Impact on Our Nation's Evolving Standards of Decency*, 15 MICH. J. RACE & L. 223 (2009) Andy Hoover & Ken Cunningham, *Framing, Persuasion, Messaging, and Messengers: How the Death Penalty Abolition Movement Succeeded in New Jersey*, 38 HUMANITY & SOC'Y 443 (2014); LARRY WAYNE KOCH et al., THE DEATH OF THE AMERICAN DEATH PENALTY: STATES STILL LEADING THE WAY 38-39 (2012).

[135] New Mexico's 2009 repeal of its death penalty applied only prospectively, leaving two inmates on death row. In 2019, the New Mexico Supreme Court reduced those sentences to life imprisonment. *See Fry v. Lopez*, 447 P.3d at 1092.

[136] Upon repeal, Governor Pat Quinn commuted fifteen remaining death sentences to life imprisonment. *See* Rob Warden, *How and Why Illinois Abolished the Death Penalty*, 30 LAW & INEQ. 245 (2012).

[137] After the legislature repealed capital punishment prospectively in 2012, the Connecticut Supreme Court held that executing past sentences violates the State's constitutional prohibition on cruel and unusual punishment. *See Santiago*, 122 A.3d at 73; Steiker & Steiker, *supra* note 133, at 1639-47.

[138] *See* Ian Simpson, *Maryland Becomes Latest U.S. State to Abolish Death Penalty*, REUTERS (May 2, 2013), https://www.reuters.com/article/world/us-politics/maryland-becomes-latest-us-state-to-abolish-death-penalty-idUSBRE9410TR/. Governor Martin O'Malley commuted the State's last four death sentences in 2014. *See Maryland Commutes Last Four Death Row Sentences to Life*, BBC (Dec. 31, 2014), https://www.bbc.com/news/world-us-canada-30636325.

[139] Massachusetts voters reinstated capital punishment via constitutional amendment in 1982. Two years later, the Massachusetts Supreme Judicial Court struck down the subsequent state statute and all existing death sentences were automatically vacated and converted to life imprisonment. *See* Commonwealth v. Colon-Cruz, 470 N.E.2d 116 (Mass. 1984); *see also* ALAN ROGERS, MURDER AND THE DEATH PENALTY IN MASSACHUSETTS 355-96 (2008) (discussing abolition of death penalty in Massachusetts). The state's last execution took place in 1947. The legislature officially removed capital punishment from state statutes in 2014. *See* Mass. Session Laws, Ch. 189, § 5 (2014); Lloyd Fillion, *A History of Recent Efforts to Abolish Life Sentencing in Massachusetts*, S. NE. CONF. UNITED CHURCH OF CHRIST (Apr. 24, 2024), https://www.sneucc.org/postdetail/18348818.

[140] *See* Lisa A. Kort-Butler & Colleen M. Ray, *Public Support for the Death Penalty in a Red State: The Distrustful, the Angry, and the Unsure*, 21 PUNISHMENT & SOC'Y 473, 1-2 (2019).

[141] Following *Furman*, New Hampshire enacted a mandatory death penalty statute, which was invalidated by *Woodson*, and enacted a revised statute in 1977. *See* State v. Addison, 7 A.3d 1225, 1234-35 (NH 2010). When the New Hampshire Legislature abolished capital punishment in 2019, it did so prospectively, leaving one person on the

Oregon's legislature sharply narrowed death-eligibility in 2019, effectively eliminating capital punishment for typical first-degree murders; it commuted all existing death sentences and closed its death row.[142] Oregon may support narrow use of capital punishment for extraordinary crimes but is generally opposed to capital punishment for murder.

The trend has continued in the 2020s. Colorado repealed its death penalty in 2020.[143] Virginia abolished it in 2021 and converted its remaining death sentences to life terms.[144] Washington made abolition official in 2023.[145] Delaware formally abolished capital punishment in 2024.[146]

Why states abolish capital punishment is not central to the Court's consensus analysis,[147] but the legislative success of the abolition movement reflects widespread dissatisfaction with

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State's death row, Michael Addison, who was sentenced to death for killing a police officer. In 2025, the New Hampshire Supreme Court agreed to hear Addison's petition challenging his death sentence as excessive and disproportionate under current law and public standards. *See Petition of Michael Addison*, No. 2025-0273, N.H. Sup. Ct., N.H. JUDICIAL BRANCH, https://www.courts.nh.gov/media/requested-cases/supreme-court/criminal/2025-0273-petition-michael-addison.

[142] Oregon retains a death penalty for narrow categories, including certain acts of terrorism and aggravated murder involving child victims, but it is not an authorized punishment for a typical first-degree murder. *See* Dirk VanderHart, *Gov. Kate Brown Signs Bill Narrowing Oregon Death Penalty*, KHSU (Aug. 1, 2019), https://www.khsu.org/regional-interests/2019-08-01/gov-kate-brown-signs-bill-narrowing-oregon-death-penalty.

[143] *See* Jesse Paul & John Ingold, *Governor Signs Bill Abolishing Colorado's Death Penalty, Commutes Sentences of State's 3 Death Row Inmates*, COLORADO SUN (Mar. 23, 2020), https://coloradosun.com/2020/03/23/colorado-death-penalty-repeal/.

[144] *See* Aimee Briel Clesi & Michael L. Radelet, *Race, Politics, and Redemption: An Investigation into Virginia's Death Penalty Repeal*, 25 LOY. J. PUB. INT. L. 1 (2023); Bernadette M. Donovan, *Certain Prosecutors: Geographical Arbitrariness, Unusualness, & the Abolition of Virginia's Death Penalty*, 29 WASH. & LEE J. CIV. RTS. & SOC. JUST. 1 (2022).

[145] *See* Chandelis Duster, *Washington State Eliminates Death Penalty from Law*, CNN (Apr. 21, 2023), https://www.cnn.com/2023/04/21/politics/washington-state-death-penalty-eliminated. Washington's Supreme Court rejected the state's capital punishment system as arbitrary and racially biased in 2018. *See Gregory*, 427 P.3d at 633. The court did not find capital punishment per se unconstitutional, allowing the possibility of a constitutional system. Gov. Jay Inslee issued a moratorium on the death penalty in 2014.

[146] Delaware's death-penalty statute was declared unconstitutional in 2016. *See* Rauf v. State, 145 A.3d 430 (Del. 2016). In 2024, the state legislature officially abolished capital punishment and remaining death sentences were converted to life imprisonment. *See* Mary Kate Delucco, *Delaware Officially Repeals Its Death Penalty*, DEATH PENALTY FOCUS (Oct. 28, 2024), https://deathpenalty.org/delaware-officially-repeals-its-death-penalty/.

[147] Although some have argued that it should. *See*, *e.g.*, *Roper v. Simmons*, 543 U.S. at 610-11 (Scalia, J., dissenting) (arguing that states which have abolished capital punishment entirely did not specifically reject capital punishment for juveniles).

capital punishment across the political spectrum.[148] One factor contributing to the decline of capital punishment is the institution of LWOP sentences.[149] Before the 1970s, most states offered life with parole eligibility after a term of years. As LWOP became routine in the 1980s and early 1990s, it provided a durable and cost-effective alternative to execution.[150]

The abolition trend is particularly salient because it occurred while the Court continued to permit capital punishment. This is not a case in which the Court's decisions discouraged legislative experimentation;[151] states freely and deliberately choose to abolish capital punishment.

At the time of this writing, twenty-three states have either never authorized the death penalty or have officially abolished it.[152] Oregon abolished it for nearly all first-degree murders, bringing the tally to twenty-four states, plus D.C., that reject capital punishment for murder. Twenty-six states still authorize capital punishment. Despite the trend toward abolition, death-penalty states still outnumber abolition states. But a tally of statutes alone does not capture contemporary reality.

B. Use and Practice

Statutory authorization does not necessarily reflect contemporary practice. During the 1980s and 1990s, many states both authorized and used capital punishment. As shown in Figure 1, during the peak of capital punishment, most death-penalty states imposed more than one death sentence per year and some imposed more than one per month. Laws and practices together supported a consensus in favor of capital punishment for murder.

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[148] States have not necessarily abolished or stopped using the death penalty because they believe it is cruel. *See* Roderick M. Hills Jr, *Counting States*, 32 HARV. J.L. & PUB. POL'Y 17, 20 (2009) ("That a state legislator rejects a punishment [] may have nothing to do with the legislator's assessment that the punishment is cruel."); Carol S. Steiker & Jordan M. Steiker, *Costs and Capital Punishment: A New Consideration Transforms an Old Debate*, 2010 U. CHI. LEGAL F. 117 (2010) (discussing impact of financial considerations in debate penalty debate).

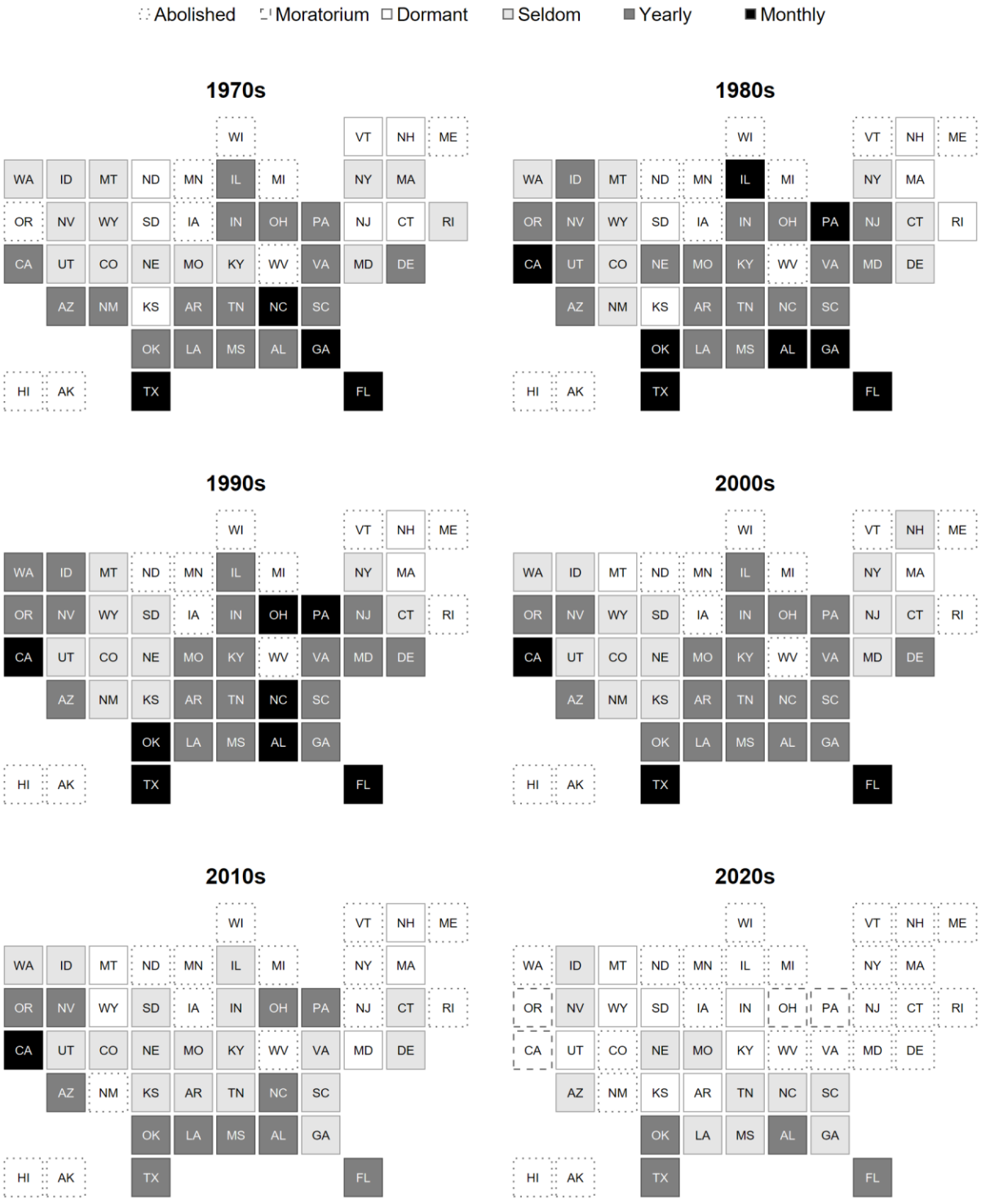
[149] *See* Steiker & Steiker, *supra* note 19, at 12-15.

[150] William W. Berry III, *Ending Death by Dangerousness: A Path of the De Facto Abolition of the Death Penalty*, 52 ARIZ. L. REV. 889 (2010). Today, every state and the federal system maintain a life-without-parole (LWOP) sentencing provision, and more than 55,000 prisoners are serving LWOP sentences—compared with roughly 2,300 prisoners under sentence of death. *See* Ashley Nellis, *Still Life: America's Increasing Use of Life and Long-Term Sentences,* THE SENTENCING PROJECT, https://www.sentencingproject.org/app/uploads/2022/10/Still-Life.pdf.

[151] *Compare Kennedy*, 554 U.S. at 448-54 (Alito, J., concurring) (arguing that the *Coker* decision discouraged states from making child rape a capital offense).

[152] *See State by State,* DEATH PENALTY INFO. CTR. (n.d.), https://deathpenaltyinfo.org/state-and-federal-info/state-by-state (last visited Feb. 10, 2025).

Figure 1: Death Penalty Use by State and Decade



Today, twenty-seven states authorize capital punishment, but only a few regularly impose death sentences.[153] Statutory support is largely a façade in Georgia and many other states. De facto abolition of capital punishment has taken place through executive moratoria, prolonged non-use, and the increasingly rare imposition of death sentences.

Governors in Oregon, Pennsylvania, Ohio, and California have imposed official moratoria on executions.[154] Oregon's moratorium on executions started in 2011.[155] Since the governor's moratorium on executions in 2011, Oregon has not imposed many new death sentences.[156] Oregon has commuted all death sentences to LWOP and closed its death row.[157] Pennsylvania maintains a sizeable death row population, but its governor imposed a moratorium on executions in 2015.[158] Likewise, Ohio's governor imposed a moratorium on executions in 2019.[159] California halted executions in 2019.[160]

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[153] Because we are assessing contemporary support for capital punishment, this Article focuses on the imposition of death sentences rather than executions carried out decades ago. A proponent might also argue that "use" includes announcing the state's intention to seek the death penalty in cases where defendants plead guilty in exchange for life sentences, but in those cases the state offered and accepted life sentences, rather than imposing death sentences.

[154] *See Death Sentences in the United States Since 1973*, DEATH PENALTY INFO. CTR. (n.d.), https://deathpenaltyinfo.org/facts-and-research/data/sentencing-data/death-sentences-in-the-united-states-from-1977-by-state-and-by-year (last visited Jan. 6, 2026).

[155] *See* Helen Jung, *Gov. John Kitzhaber: Oregon Death Penalty Fails 'Basic Standards of Justice'*, OREGON LIVE (Nov. 23, 2011), https://www.oregonlive.com/pacific-northwest-news/2011/11/gov_john_kitzhaber_oregon_deat.html; Aliza B. Kaplan, *Oregon's Death Penalty: The Practical Reality*, 17 LEWIS & CLARK L. REV. 1 (2013).

[156] Oregon has imposed four death sentences on three different defendants since 2011, most recently in 2016. *See Death Penalty Census Database*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/facts-and-research/data/death-penalty-census/sentences?jurisdiction=Oregon&sort=year/desc (last visited Jan. 16, 2026).

[157] In 2022, Gov. Kate Brown commuted the sentences of all death row inmates. *See* Rachel Treisman, *Oregon Gov. Kate Brown Explains Why She Commuted All of Her State's Death Sentences*, NPR (Dec. 15, 2022), https://www.npr.org/2022/12/15/1143002545/oregon-death-sentence-governor-kate-brown.

[158] Pennsylvania Gov, Tom Wolf announced a moratorium on executions in 2015. *See* Kevin Conion, *Pennsylvania Governor Halts Death Penalty While 'Error Prone' System Reviewed*, CNN (Feb. 13, 2015), https://www.cnn.com/2015/02/13/us/pennsylvania-death-penalty-moratorium.

[159] Ohio Gov. Mike DeWine halted state executions in 2019. *See* Jessie Balmert & Cameron Knight, *As Ohio Struggles to Find a Painless Way to Kill Death Row Inmates, Is This the End of Death Penalty?*, CINCINNATI ENQUIRER (Apr. 16, 2019), https://www.cincinnati.com/story/news/politics/2019/04/16/ohio-death-penalty-jeffrey-wogenstahl/3421304002. It is unclear whether Ohio will cease or resume capital punishment. *See* Jeremy Pelzer, *Gov. Mike DeWine Says He'll Make Announcement on Ohio's Death Penalty in January*, CLEVELAND.COM (Dec. 11, 2025), https://www.cleveland.com/news/2025/12/gov-mike-dewine-says-hell-make-announcement-on-ohios-death-penalty-in-january.html.

[160] Before *Furman* was decided, the California Supreme Court independently abolished the death penalty under the California Constitution. *See* People v. Anderson, 6 Cal. 3d 628 (1972). After *Anderson*, the California Legislature did

Nationwide, death sentencing has collapsed relative to the late twentieth century. Quietly, states like Georgia and North Carolina, once champions of capital punishment, have nearly stopped imposing death sentences.[161] They are not alone. Every state that still authorizes capital punishment for murder imposes it far less frequently than it did in the late twentieth century.[162]

Eight death-penalty states, along with the U.S. military, have imposed no death sentences this decade.[163] Montana and Wyoming have not imposed death sentences for more than twenty years.[164] It has been more than ten years since anyone was sentenced to death in Indiana, Kentucky, South Dakota, or Utah.[165] Kansas and Oregon last imposed death sentences in 2016; Arkansas last imposed a death sentence in 2018.

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not and could not simply reenact capital punishment on its own, because the California Supreme Court had held it unconstitutional under the state constitution. A voter-approved constitutional amendment overruled Anderson in 1972. Once Proposition 17 passed, the Legislature then enacted death-penalty statutes consistent with the new constitutional authorization that defined capital murder categories and established sentencing procedures. California has the nation's largest death row by population. Gov. Gavin Newsom ordered a moratorium on executions in 2019, but the state's Constitution prevents executive commutation of most death sentences. *See* CALIF. CONST., art. V, § 8(a); *see also* Robin Epley, *CA's Death Penalty is Broken, Says Newsom. So Why Won't He End It for Good?*, SACRAMENTO BEE (Jan. 17, 2026), https://www.sacbee.com/opinion/article314351733.html. California's complex relationship with capital punishment has been explored in other works. *See* Matthew C. Altman, *Arbitrariness and the California Death Penalty*, 14 OHIO ST. J. CRIM. L. 217 (2016); Steven F. Shatz & Nina Rivkind, *The California Death Penalty Scheme: Requiem for Furman*, 72 NYU L. REV. 1283 (1997).

[161] *See* Ben Jones, *The Republican Party, Conservatives, and the Future of Capital Punishment*, 108 J. CRIM. L. & CRIMINOL. 223 (2018) (discussing the growing opposition to capital punishment in traditionally conservative states).

[162] In several states where capital punishment remains technically available, prosecutors have declined to seek death in ordinary homicide cases, citing cost, delay, and diminished jury support. *See* Daniel Nichanian, *Newly Elected Prosecutors Are Challenging the Death Penalty*, BOLTS (Dec. 9, 2020), https://boltsmag.org/new-prosecutors-challenging-death-penalty.

[163] Historically, support for capital punishment has been high in Utah; nevertheless, the state has not yet imposed a death sentence this decade. *See* Katie McKellar, *New Poll Reveals Support for the Death penalty is Fading in Utah*, DESERET NEWS (Oct. 27, 2021), https://www.deseret.com/utah/2021/10/27/22748819/new-poll-reveals-what-utahns-think-about-abolishing-utahs-death-penalty-utah-capital-punishment.

[164] It has also been more than ten years since the U.S. military has imposed a death sentence. *See Death Penalty Census Database*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/facts-and-research/data/death-penalty-census/sentences?jurisdiction-type=U.S.+Military&sort=year/desc.

[165] *See Death Sentences in the United States Since 1973*, DEATH PENALTY INFO. CTR. (n.d.), https://deathpenaltyinfo.org/facts-and-research/data/sentencing-data/death-sentences-in-the-united-states-from-1977-by-state-and-by-year. Although Indiana and Utah have not imposed new death sentences during the current decade, both states have carried out executions during this period.

Eleven states have imposed death sentences only rarely this decade. Six have imposed only one death sentence. Five other states, along with the federal government, have averaged fewer than one per year.

Only four states—Alabama, Florida, Oklahoma, and Texas—have averaged more than one death sentence per year this decade.[166] Even in these states, the decline of capital punishment is evident. Florida has imposed 7.4 death sentences per year this decade, more than any other state, but its current use pales in comparison to past decades.[167] Florida imposed 37.4 per year in the 1980s and 38.5 death sentences per year in the 1990s. The decline is even greater in Texas. The Lone Star State has averaged 3.8 death sentences per year this decade, second-most of any state, but it imposed 32.8 death sentences annually in the 1980s and 39.8 death sentences annually in the 1990s. Similar declines have occurred in Alabama and Oklahoma.[168] It is, in fact, generous to4 conclude that several states support capital punishment because a few counties within those states generate death sentences.[169] Capital punishment has shifted from regular practice to an extraordinary, geographically isolated, and infrequently exercised sanction.[170]

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[166] If we disregard its moratorium on executions, California is a state that regularly impose death sentences. California has imposed nineteen death sentences so far this decade—the same number as Texas. *See Death Penalty Census Database*, DEATH PENALTY INFO. CTR., (n.d.) https://deathpenaltyinfo.org/facts-and-research/data/death-penalty-census/sentences?jurisdiction=California&sort=year/desc (last visited Jan. 16, 2026).

[167] Florida is bucking the nationwide trend in some respects. It has abandoned the unanimous jury verdict requirement in favor of an 8-4 majority-vote rule, expanded the range of capital offenses, and increased executions relative to prior years. *See* Noah Berg & Jasmine Shokoor, *Florida's Multifaceted Expansion of the Death Penalty Raises Constitutional Concerns*, ABA DEATH PENALTY REPRESENTATION PROJECT BLOG (May 4, 2023), https://www.americanbar.org/groups/committees/death_penalty_representation/publications/project_blog/florida-expands-the-death-penalty/.

[168] Alabama has imposed 3.2 death sentences per year this decade, a fraction of its annual averages in the 1980s and 1990s, 13.4 and 16.8, respectively. Oklahoma has imposed the fourth-most death sentences this decade, averaging just over one per year (six so far in the 2020s), a dramatic decline from the 135 death sentences imposed in the 1980s and the 128 imposed in the 1990s.

[169] *See* Glossip v. Gross, 576 U.S. 863, 941 (2015) (Breyer, J., dissenting) (observing that a small number of counties impose a disproportionate share of death sentences).

[170] Frank R. Baumgartner et al., *Learning to Kill: Why a Small Handful of Counties Generates the Bulk of US Death Sentences*, 15 PLOS ONE e0240401 (2020); John J. Donohue, *Empirical Analysis and the Fate of Capital Punishment*, 11 DUKE J. CONST. L. & PUB. POL'Y 51 (2016) (documenting how the modern death penalty has become geographically rare, racially skewed, and penologically marginal).

C. Interpreting "Mixed Signals" from States

A survey of laws and practices yields clear anchors. Twenty-three states categorically reject capital punishment for murder by abolishing the death penalty. On the other hand, at least four states support it in practice by authorizing it and regularly imposing death sentences.[171] The difficulty lies in the remaining states that retain death-penalty statutes but use them rarely—or not at all.[172] They seem to say one thing and do another. How those states are counted determines whether the national tally shows a clear consensus or a narrow statutory majority for retention.

By applying case law to known facts to the best of our ability, we can resolve ambiguities and identify contemporary standards of decency.[173] Some may disagree with how we read the laws and practices of these states, but we will have at least identified our assumptions to clarify the nature of those disagreements.

1. Non-Legislative Acts

Some states send policy signals through executive orders, judicial decisions, or referenda rather than legislative repeal. Whether and how to count these non-legislative acts affects the consensus analysis.

Four states retain death-penalty statutes but have gubernatorial moratoria on executions. These moratoria are typically grounded in governors' constitutional reprieve powers rather than express statutory delegations, and future governors may revoke them. For that reason, executive orders warrant less weight than legislative action.[174] A cautious approach is to treat moratoria as

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[171] The number of states that "actively use" the death penalty depends on the definition of active use. *See infra* Section III.C.3.

[172] *See* Tonja Jacobi, *The Subtle Unraveling of Federalism: The Illogic of Using State Legislation as Evidence of an Evolving National Consensus*, 84 N.C. L. Rev. 1089, 1123-49 (2006) (discussing challenges of counting states).

[173] The twenty-three mixed-signal states are not like survey respondents who report they are undecided or do not know their answer. There is no missing data. The task is to interpret available data to fairly classify state practices. In contrast, the Court's analysis of state policies in *Thompson* was complicated by missing data; there, nineteen states authorized capital punishment without setting a minimum age at time of offense, making it unclear whether they should be considered supporters, opponents, or ignored. *See Thompson*, 487 U.S. at 849-50 (O'Connor, J., concurring) (discussing the classification problem).

[174] The Court's treatment of federal executive orders is instructive. *See*, *e.g.*, Dames & Moore v. Regan, 453 U.S. 654, 686 (1981) (upholding executive orders resolving claims with Iran because Congress had implicitly authorized the practice); Medellin v. Texas, 552 U.S. 491, 528-30 (2008) (holding that a presidential memorandum does not preempt state law absent independent constitutional authority or statutory authorization)

relevant context but to rely primarily on death-sentencing practice.[175] On that view, California still regularly imposes death sentences. Despite a statewide moratorium on executions, for example, California has imposed nineteen death sentences in the 2020s.[176] Ohio and Pennsylvania have rarely imposed death sentences; and Oregon has become dormant.[177]

In four other states, capital punishment was initially invalidated by state supreme courts rather than repealed by legislatures. Judicial invalidation—especially on state constitutional grounds—is durable but may be characterized as legal judgment rather than direct democratic choice. The force of that objection is limited because in three of the four states—Delaware, Washington, and Massachusetts—the legislature later codified abolition. New York is the exception: its high court struck the death penalty more than twenty years ago,[178] and the legislature has acquiesced and not reinstated it.[179]

Finally, in some states, the death penalty has been enacted, reinstated, or preserved by popular vote rather than state legislatures.[180] In all but two of these states, the legislature enacted capital punishment laws following ballot measures. In Nebraska, however, the legislature abolished capital punishment only to have it reinstated by voters. Similarly, in Oregon, the death penalty was reinstated through a ballot measure, not through a legislative act. If one counts state legislative acts and disregards popular referenda, Nebraska adds to the tally of states against capital punishment, notwithstanding popular support. Oregon does not because its ballot measure reversed a court decision, rather than a legislative act. The Court has been skeptical of using public opinion

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[175] Hall v. Florida, 572 U.S. 701, 716 (2014) (counting Oregon on the same "side of the ledger" as "the 18 States that have abolished the death penalty" because the governor there has "suspended the death penalty" and the state has "executed only two individuals in the past 40 years").

[176] California legislators have proposed abolishing the death penalty, but none of those bills has been passed into law. *See* Alexi Koseff, *Is This Another Way to End California's Death Penalty?*, CAL MATTERS (Feb. 9, 2022), https://calmatters.org/politics/2022/02/california-death-penalty-end/. California voters have rejected constitutional amendments to abolish capital punishment. *See History of Capital Punishment in California*, CALIF. DEPT. OF CORRECTIONS & REHAB. (n.d.), https://www.cdcr.ca.gov/capital-punishment/history/.

[177] Oregon has not imposed a death sentence this decade. Ohio and Pennsylvania have each imposed two.

[178] New York's highest court invalidated the state's death penalty statute in 2004. *See LaValle*, 817 N.E.2d at 367.

[179] New York's legislative history is comparable to that of North Dakota and Vermont, where death penalties were invalidated by *Furman*, and never revived. These state legislatures may not have abolished capital punishment, but decades of legislative inaction reflect a settled acceptance of abolition.

[180] *See History of Death Penalty Ballot Measures*, BALLOTPEDIA (nd), https://ballotpedia.org/History_of_death_penalty_ballot_measures (last visited Jan. 13, 2026)

as evidence of contemporary standards of decency, but has also recognized popular referenda as exercises of state legislative power.[181] Existing doctrine does not clearly resolve how ballot measures should be weighted in this context, which reinforces the need to examine actual use.

2. Continuous Non-Use

Eight death-penalty states (nine if Oregon is included) have imposed no death sentences this decade. In these states, capital punishment exists in theory but not in practice. Officials may occasionally pledge renewed enforcement, but political rhetoric is a poor proxy for actual punishment practices.[182]

The Court has repeatedly treated statutory authorization without use as weak evidence of support. In *Atkins*, the Court observed that states which authorize sentencing intellectually disabled offenders to death without doing so do not actively support the practice; they may have simply dodged the issue.[183] In *Graham*, the Court observed that thirty-seven states authorized sentencing juveniles to LWOP, but only eleven imposed the punishment with any regularity. The Court's summary of actual sentencing practices is an apt description of the death penalty today:

> A significant majority … are serving sentences imposed in Florida. The other[s] … are imprisoned in just 10 States[.] Thus, only 11 jurisdictions nationwide in fact impose life without parole sentences on juvenile nonhomicide offenders—and most of those do so quite rarely—while 26 States, the District of Columbia, and the Federal Government do not impose them despite apparent statutory authorization.[184]

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[181] *See* Arizona State Legislature v. AIRC, 576 U.S. 787, 795-96 (2015) (finding ballot referendum establishing an independent redistricting commission on equal footing with state legislative act).

[182] Some states maintain death penalty statutes to appear tough on crime but do not use it. From a political perspective, maintaining a dormant statute may be safer than formally repealing it. *See* Donald L. Beschle, *Why Do People Support Capital Punishment: The Death Penalty as Community Ritual*, 33 CONN. L. REV. 765 (2000).

[183] "[E]ven in those States that allow the execution of mentally retarded offenders, the practice is uncommon. Some States … continue to authorize executions, but none have been carried out in decades. Thus there is little need to pursue legislation barring the execution of the mentally retarded in those States." *Atkins*, 536 U.S. at 316.

[184] *Graham*, 560 U.S. at 64

Although only thirteen states prohibited sentencing juveniles to LWOP, "an examination of actual sentencing practices in jurisdictions where the sentence in question is permitted by statute discloses a consensus against its use."[185]

Continuous non-use raises the question of how long a state can go without imposing a death sentence before it counts as opposition. One wants to be confident that continuous non-use is a meaningful signal. We would not say that someone is a smoker because they smoked cigarettes many years ago, but we also would not declare them a nonsmoker because they quit yesterday.[186] Some considerations seem pertinent to making inferences from continuous nonuse.

The longer the period of continuous non-use, the more the state's inaction signals its true values rather than unusual circumstances, such as a temporary pause in jury trials due to public health emergency. A decade-based cutoff is imperfect but reasonable as evidence of current practices.[187] If non-use must continue for ten or more years to be a reliable indicator, then two states, Kansas and Arkansas, would move to the rare-use category (discussed in the next section) rather than the continuous non-use category.

Non-use is also meaningful because murder is not a rare offense. States that have gone years without imposing death sentences have bypassed hundreds or thousands of opportunities to do so. Wyoming, the smallest state by population, has averaged roughly twenty-five homicides per year since 2000, implying hundreds of foregone opportunities to impose death penalties.[188] Indiana averages roughly 350 homicides per year, implying thousands of foregone opportunities

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[185] *Id.* at 62. Similarly, in *Miller*, the Court determined that twenty-nine states ostensibly required judges to sentence juveniles to LWOP for homicides and eleven more states permitted the punishment at the judge's discretion. *See Miller*, 567 U.S. at 486-87.

[186] For most insurance purposes, someone is considered a non-smoker if they have not used tobacco or nicotine in any form in the last twelve months. *See* Kimberly Lankford, *Life Insurance for Smokers: Cost, Options and Strategies to Help Save Money*, WALL ST. J. (Nov. 21, 2025), https://www.wsj.com/buyside/personal-finance/life-insurance/life-insurance-for-smokers. Insurance companies require longer abstinence from illegal drug, usually two to five years, but the duration varies by drug and company. *See* Amanda Shih & Katherine Murbach, *Life Insurance for People Who've Used Drugs: What You Need to Know*, POLICYGENIUS (Nov. 13, 2023), https://www.policygenius.com/life-insurance/life-insurance-for-drug-users/.

[187] At the time of this writing, the nation has completed five years of the 2020s. Five years is generally in line with constitutional time horizons used to structure representative government. *See*, *e.g.*, U.S. CONST., art. I, § 2, cl. 1 (establishing two-year terms for Representatives); *Id.*, art. II, sec. 1, cl. 1 (four-year terms for Presidents); *Id.*, art. I, § 3, cl. 1 (six-year terms for Senators); *Id.*, art. I, § 2, cl. 3 (requiring Census and reapportionment every ten years).

[188] *See* Emily A. Grant, Laurel A. Wimbish, & Lena K. Dechert, *Wyoming Homicides and Missing Persons*, WY. SURVEY & ANALYSIS CTR. at 6 (2002), https://wyoleg.gov/InterimCommittee/2022/STR-202210183-052022 WyomingHomicideandMissingPersonUpdate.pdf.

over a decade.[189] Sustained non-use of capital punishment for murder therefore signals a state's contemporary sentencing values rather than mere happenstance

Finally, continuous non-use is more persuasive when it persists across changes in partisan control of the state government and is not limited to the concerted efforts of a single liberal actor. In four states—Kansas, Kentucky, Montana, and Wyoming—continuous non-use has persisted during both Democratic and Republican governorships. In Arkansas, Indiana, South Dakota, and Utah, there has been continuous non-use of capital punishment while Republicans have enjoyed unified control of the state government. Oregon is the only state in which continuous non-use has not persisted during Republican control of government, but three different governors have maintained the state's moratorium on executions.[190]

3. Rare Use

Eleven death-penalty states rarely impose death sentences: six have imposed only one this decade, and five average fewer than one per year. Rare use suggests more support than continuous non-use, but not much. What do these states tell us about contemporary standards of decency? We would not consider someone a smoker because they smoke a cigar on their birthday,[191] or a drinker because they drink champagne on New Year's Eve. Similarly, we may not consider a state a death penalty state if it prosecutes homicides every day and imposes one death sentence.

Rare use should be assessed relative to opportunities, and it is important to account for homicide and clearance rates. Homicide rates peaked in 1991 and have since fallen roughly by

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[189] *See FBI Crime Data Discovery Tool*, FBI (n.d.), https://cde.ucr.cjis.gov/LATEST/webapp/#/pages/explorer/crime/query (reporting monthly homicide counts in Indiana) (last visited Jan. 19, 2026).

[190] Oregon Gov. John Kitzhaber imposed a moratorium on executions in 2011. His successor, Kate Brown, continued the moratorium as has her successor, Tina Kotek. *See* Conrad Wilson, *Oregon Governor Candidates Weigh in on Death Penalty*, OR. PUB. BROADCASTING (Sept. 22, 2022) (reporting Gov. Kotek's support for the moratorium and personal opposition to the death penalty).

[191] Some life insurance companies classify individuals who smoke twelve or fewer cigars per year as nonsmokers, which substantially decreases their insurance rates. *See* Kimberly Lankford, *Life Insurance for Smokers: Cost, Options and Strategies to Help Save Money*, WALL ST. J. (Nov. 21, 2025), https://www.wsj.com/buyside/personal-finance/life-insurance/life-insurance-for-smokers (noting that some insurers offer nonsmoker rates to individuals who smoke a limited number of cigars per year); Doug Mitchell, *Life Insurance for Cigar Smokers: Do You Pay More?*, OGLETREE FIN. SERVS. (Oct. 29, 2025), https://ogletreefinancial.com/blog/affordable-life-insurance-when-you-smoke-cigars-or-a-pipe/.

half.[192] The proportion of homicides that result in an identified offender—commonly called the clearance rate—has declined from roughly 90 percent in the 1960s to about 50 percent today.[193] These trends would reduce death sentencing even if support remained constant.

The death-sentencing rate per solved murder isolates the propensity of juries to impose death sentences for murder.[194] In the 2020s, juries have imposed approximately one death sentence per 400 solved murders. At the end of the twentieth century, the death-sentencing rate was more than ten times what it is now;[195] in 1999, it was roughly fifteen times higher.

Rare use matters even under the Court's own earlier descriptions of "meaningful" usage. In *Furman*, Justice Powell found contemporary community support for capital punishment because juries imposed approximately two death sentences per week and that rate had "remained relatively constant over the last 10 years."[196] But contemporary usage is nowhere near the level cited favorably by Powell. Since 2020, juries have imposed about two death per month, on average.[197]

At some point, rare use becomes incompatible with a functional capital system. Capital trials are complex and unforgiving.[198] When states impose only a few death sentences per year, institutional competence decays: defense counsel and prosecutors lack experience, judges see too few cases to develop expertise, and execution protocols become harder to administer reliably. The

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[192] *See Trends in Homicide: What You Need to Know*, COUNCIL ON CRIM. JUST. (Dec. 2023), https://councilonj.org/homicide-trends-report/.

[193] *See* Thomas Hargrove, *How Many Unsolved Murders Are There?*, MURDERDATA (Jan. 2015), https://www.murderdata.org/2015/01/how-many-unsolved-murders-are-there-its_24.html; *FBI Crime Data Explorer*, FBI, https://cde.ucr.cjis.gov/LATEST/webapp/#/pages/explorer/crime/crime-trend (reporting clearance rate for homicide as selected crime).

[194] A better measure would be the number of death sentences imposed per 100 first-degree murder convictions, but this figure cannot be calculated from available data.

[195] State-level analyses confirm this result. In North Carolina, for example, a homicide was 5.2 times more likely to yield a death sentence from 1990 to 2001 than from 2002 to 2013, even after controlling for the number of murders. *See* Frank R. Baumgartner, *North Carolina's Wasteful Experience with the Death Penalty* at 11 (Feb. 1, 2015), https://fbaum.unc.edu/Innocence/Baumgartner_NC_Death_Reversals-1-Feb-2015.pdf.

[196] *Furman*, 408 U.S. at 441.

[197] *See Death Sentences in the United States Since 1973*, DEATH PENALTY INFO. CTR. (n.d.), https://deathpenaltyinfo.org/facts-and-research/data/sentencing-data/death-sentences-in-the-united-states-from-1977-by-state-and-by-year (reporting that the total number of death sentences imposed nationwide from 2020 to 2024 was 18, 18, 21, and 21, respectively).

[198] "Once the statute is enacted, there is the burden of training and coordinating the efforts of those who must implement the new law." *Kennedy*, 554 U.S. at 452 (Alito, J., dissenting).

American Bar Association's Death Penalty Assessments document these problems in low-use states, finding persistent failures in representation, forensic reliability, judicial management, appellate review, and execution procedures.[199] In states where capital punishment rarely practiced, the death penalty becomes hollowed out, marked by higher error rates, inexperienced actors, and procedural dysfunction; these states may formally authorize capital punishment, but they are institutionally incapable of supporting it.[200]

Let us do our best to classify states that give mixed signals about capital punishment for murder based on objective indicia. For purposes of counting states, caution is warranted. The opposition tally includes: (a) twenty-three abolition states, (b) Oregon,[201] and (c) eight continuous non-use states.[202] Rare-use states do not clearly demonstrate opposition and should not be counted as opponents until non-use becomes sustained; any state that has imposed a death sentence this decade—including Georgia's single sentence and the moratorium states that still impose death sentences—does not count as an opponent. This does not mean that eighteen states firmly support capital punishment for murder—perhaps only four or five states do—only that eighteen states have not clearly rejected it.

D. How Many States Constitute a Consensus?

On a cautious tally of state laws and practices, thirty-two states oppose capital punishment for murder and eighteen states are in favor or not clearly opposed.[203] Do thirty-two states constitute

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[199] *See, e.g., The Georgia Death Penalty Assessment Report,* AM. BAR ASS'N at v (Jan. 2006), https://www.americanbar.org/content/dam/aba/administrative/crsj/deathpenalty/georgia_report.pdf (calling for a moratorium on executions in Georgia); STEIKER & STEIKER, *supra* note 70, at 279-82 (discussing ABA findings and the relationship between frequency of use and institutional competence).

[200] *See* Andrew Gelman et al., *A Broken System: The Persistent Patterns of Reversals of Death Sentences in the United States*, 1 J. EMPIRICAL LEGAL STUD. 209 (2004) (showing extremely high error rates correlated with weak state infrastructures); Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What It Says About Us*, 63 OHIO ST. L.J. 63, 110-12 (2002) (discussing loss of execution-protocol competence).

[201] If Oregon is not counted as an abolition state based on its narrow capital punishment statute, it still should be counted among states opposed to capital punishment for murder based on continuous non-use.

[202] The number of states opposed to capital punishment for a specific offense or offender includes states that have abolished capital punishment entirely. *See*, *e.g.*, Tison v. Arizona, 481 U.S. 137, 152-54 (1987) (observing that twenty-three states forbid executing an active participant without specific intent to kill because eleven states require specific intent to kill and twelve states forbid capital punishment entirely).

[203] For this cautious count, I disregard executive moratoriums and focus on actual imposition of death sentences in moratorium states in the 2020s. In Oregon, the death penalty has been completely dormant whereas Ohio,

a national consensus against capital punishment for murder? The Court has never explicitly set a threshold number that constitutes a national consensus, but its past decisions indicate that three-fifths of the states suffice.[204]

In the juvenile-execution cases, the Court upheld the execution of a seventeen-year-old in 1988 when states were roughly evenly split,[205] but struck it down in 2005 when thirty states opposed the practice.[206] The intellectual-disability cases show a similar pattern: the Court upheld the practice in 1989 when sixteen states opposed it,[207] and invalidated it in 2002 when thirty states opposed it.[208] By these benchmarks, thirty-two states constitute a national consensus against capital punishment for murder. Only eighteen states have demonstrated even minimal support by imposing a death sentence for murder this decade—less state support than existed for punishments rejected in *Roper Adkins.*

E. Additional Considerations

Although state laws and practices are central, other sources also inform contemporary standards, such as public opinion polls, jury decisions, the opinions of professional organizations, and the experience of other advanced nations. Those sources largely point in the same direction.

Public opinion polls still show a narrow majority in favor of the death penalty, and referenda in Nebraska and Oregon suggest voters may support capital punishment more than legislators do. But polls are limited in two respects. First, support has declined sharply.[209] Gallup

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Pennsylvania, and California have continued to impose some death sentences despite their state moratoriums on executions. Other scholars reach similar results. *See* Robert J. Smith et al., *The Way the Court Gauges Consensus (and How To Do It Better)*, 35 CARDOZO L. REV. 2397 (2013).

[204] The Court has upheld punishments opposed by fewer than thirty states and rejected those opposed by thirty or more states in other cases. *See*, *e.g.*, *Tison*, 481 U.S. at 152-54 (upholding constitutionality of punishment opposed by twenty-three states); *Enmund*, 458 U.S. at 789-90 (holding punishment rejected by forty-two states unconstitutional under Eighth Amendment); *Kennedy*, 554 U.S. at 429 (rejecting punishment opposed by forty-four states); *Coker*, 433 U.S. at 595-96. (rejecting punishment authorized by only one state).

[205] Stanford v. Kentucky, 492 U.S. 361, 370-71 (1989).

[206] *Roper v. Simmons*, 543 U.S. at 564.

[207] *Penry*, 492 U.S. at 334.

[208] *Atkins*, 536 U.S. at 314-15.

[209] Gross, *supra* note 127, at 771. Public support for capital punishment has waned for several reasons. *See* Kenneth Williams, *Why the Death Penalty is Slowly Dying*, 46 SW. L. REV. 253 (2016) (analyzing reasons for declining public support for death penalty). One factor is the growing recognition that hundreds of men and women on death row were wrongfully convicted. *See generally* FRANK R. BAUMGARTNER et al., THE DECLINE OF THE DEATH PENALTY AND THE

and the General Social Survey show a rise to roughly 75–80% in the 1990s followed by a sustained decline to around 60% in recent waves.[210] Support among younger generations is weaker, suggesting further decline ahead.[211] Second, the standard polling question—whether respondents favor the death penalty for murder—likely overstates support by omitting LWOP as an alternative; when LWOP is offered, it is typically preferred.[212] Most Americans may find capital punishment minimally acceptable, but that does not make it the contemporary standard.

Polls also pose a methodological problem for conservative justices and scholars who have criticized the use of public opinion data in Eighth Amendment cases.[213] The prevailing approach emphasizes laws and practices. Polls should not be treated as decisive simply because they support a preferred outcome. One hopes the Court does not discard its constitutional principles when those principles suggest a different result.[214]

DISCOVERY OF INNOCENCE 119-21 (2008) (documenting dramatic increase in media accounts of innocence in capital cases); Clayton B. Drummond & Robert J. Norris, *An Opportunity for Abolition: McCleskey, Innocence, and the Modern Death Penalty Decline*, 47 LAW & POL'Y e12257 (2025); Sishi Wu, *The Effect of Wrongful Conviction Rate on Death Penalty Support and How It Closes the Racial Gap*, 47 AM. J. CRIM. JUST. 1006 (2022) (finding that exposure to evidence about *wrongful convictions* reduces support across racial and ideological groups and narrows the racial gap in death-penalty attitudes); James D. Unnever & Francis T. Cullen, *Executing the Innocent and Support for Capital Punishment: Implications for Public Policy*, 4 CRIMINOL. & PUB. POL'Y 3 (2005). There is a growing belief among conservatives, who have traditionally supported capital punishment, that it takes too long, costs too much, and fails to deter crime. *See* Jones, *supra* note 161, at 235-36; Steiker & Steiker, *supra* note 148, at 118-24.

[210] *See* Jeffrey M. Jones, *Drop in Death Penalty Support Led by Younger Generations,* GALLUP (Nov. 14, 2024), https://news.gallup.com/poll/653429/drop-death-penalty-support-led-younger-generations.aspx; NORC, *Trends: Favor or Oppose Death Penalty for Murder*, GSS DATA EXPLORER (n.d.), https://gssdataexplorer.norc.org/trends?category=Civil%20Liberties&measure=cappun (last visited Jan. 20, 2026).

[211] *See* Austin Sarat, *It's Now Clear that America's Death Penalty is Dying One Generation at a Time*, L.A. TIMES (Jun. 24, 2025), https://www.latimes.com/opinion/story/2025-01-24/death-penalty-capital-punishment-execution-exoneration-generation.

[212] See Alexis M. Durham et al., *Public Support for the Death Penalty: Beyond Gallup*, 13 JUST. Q. 705, 709 (1996). Controlled mock-jury experiments and post-verdict surveys consistently show that when jurors are assured a defendant will never be released, the perceived need for a death sentence declines sharply. *See* William J. Bowers & Benjamin D. Steiner, *Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 TEX. L. REV. 605 (1998); Phoebe C. Ellsworth & Samuel R. Gross, *Hardening of the Attitudes: Americans' Views on the Death Penalty*, 50 J. SOC. ISSUES 19 (1994) (reporting that providing jurors with a LWOP alternative cuts the probability of a death recommendation by one-third to one-half).

[213] *See, e.g., Atkins*, 536 U.S. at 325-28 (Rehnquist, C.J., dissenting) (criticizing the use of public opinion polls as evidence of contemporary standards of decency).

[214] Meghan J. Ryan, *The Death of the Evolving Standards of Decency*, 51 FLA. ST. U.L. REV. 255 (2023) (warning that an originalist retreat from *Trop*'s dynamic standard would make the Eighth Amendment effectively meaningless).

Major professional communities in the United States express skepticism about—or outright opposition to—the death penalty. Medical associations emphasize that capital punishment is inconsistent with professional ethical duties and carries significant risks of botched executions and long-term psychological harm.[215] Major religious bodies have moved away from supporting capital punishment and now endorse abolition or strong limitations.[216] Economists and policy analysts routinely report that capital punishment is far more expensive than life imprisonment and produces no measurable deterrent effect.[217] There is also an overwhelming professional consensus among criminologists that the death penalty does not reduce violent crime.[218] The American Bar Association has called for a moratorium on executions.[219] Within law enforcement, the death penalty ranks at or near the bottom of strategies considered effective for reducing crime or improving public safety.[220] Former wardens and executioners increasingly voice opposition to capital punishment.[221] Even within the judiciary, death cases generate institutional hesitation and

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[215] *See* American Medical Association, *Code of Medical Ethics*, Op. 9.7.3 (2016) (prohibiting physician participation in executions); American Nurses Association, *Position Statement: Capital Punishment and Nurses' Participation in Capital Punishment* (2024).

[216] *See Catechism of the Catholic Church* §2267 (rev. 2018); U.S. Conf. of Catholic Bishops, *A Culture of Life and the Penalty of Death* (2005), https://www.usccb.org/resources/penaltyofdeath.pdf; Evangelical Lutheran Church Am., *Death Penalty Social Statement* (Oct. 2, 2013), https://www.elca.org/faith/faith-and-society/social-statements/death-penalty; Presbyterian Church (U.S.A.), *212th General Assembly: Moratorium on Capital Punishment* (2000), https://pcusa.org/sites/default/files/5-Presbyterian_Teachings_on_the_Death_Penalty-2000.pdf. *See also* Pew Research Center, *Religious Groups' Official Positions on Capital Punishment* (Nov. 4, 2009), https://www.pewresearch.org/religion/2009/11/04/religious-groups-official-positions-on-capital-punishment; Robert F. Drinan, *Religious Organizations and the Death Penalty*, 9 WM. & MARY BILL RTS. J. 171 (2000) (discussing Catholic opposition to death penalty).

[217] Michael L. Radelet & Ronald L. Akers, *Deterrence and the Death Penalty: The Views of the Experts*, 87 J. CRIM. L. & CRIMINOL. 1 (1996) (reporting wide consensus among criminologists that the death penalty does not deter violent crime).

[218] Michael L. Radelet & Traci L. Lacock, *Do Executions Lower Homicide Rates: The Views of Leading Criminologists'*, 99 J. CRIM. L. & CRIMINOL. 489 (2008) (reporting that overwhelming consensus of criminologists do not believe the death penalty deters homicide).

[219] Am. Bar Ass'n, *Death Penalty Moratorium Resolution* (1997), https://www.americanbar.org/groups/committees/death_penalty_representation/resources/dp-policy/moratorium-1997.

[220] *See* Richard C. Dieter, *Smart on Crime: Reconsidering the Death Penalty in a Time of Economic Crisis*, DEATH PENALTY INFO. CTR. 9-12 (Oct. 2009), https://files.deathpenaltyinfo.org/documents/pdf/CostsRptFinal.f1560295688.pdf.

[221] *See* Paula Mitchell, *The Weight of Capital Punishment on Jurors, Justices, Governors, & Executioners*, VERDICT (Oct. 25, 2013), https://verdict.justia.com/2013/10/25/weight-capital-punishment-jurors-justices-governors-executioners; Chiara Eisner, *Carrying Out Executions Took a Secret Toll on Workers—Then Changed Their Politics*,

delay, reflecting intense moral and emotional conflict about killing.[222] The opinions of professional organizations are not determinative, but they are largely opposed to capital punishment.

International practice points the same way. Among peer nations, the death penalty has been almost entirely abolished. Every member of the European Union prohibits the death penalty,[223] and the United States remains the only G-7 nation that still conducts executions.[224] International human-rights instruments reinforce the global consensus against capital punishment.[225] The U.N. General Assembly has repeatedly called for global moratoriums on executions. The international community now regards capital punishment for murder as a violation of modern standards of decency. Even in war, lawful killing is bounded by necessity; international law prisoners of war from execution.[226] Whatever weight international practice should carry, it underscores how far American capital punishment has drifted from contemporary norms among advanced democracies.

VA. PUB. MEDIA (Nov. 16, 2022), https://www.vpm.org/npr-news/npr-news/2022-11-16/carrying-out-executions-took-a-secret-toll-on-workers-then-changed-their-politics.; *see also* Bennett, *supra* note 95, at 374-77.

[222] Jeffrey Omar Usman, *The Twenty-First Century Death Penalty and Paths Forward*, 37 MISS. C.L. REV. 80, 91-92 (2018).

[223] *See* European Union, *Statement on the Death Penalty* (Aug. 7, 2020), https://www.eeas.europa.eu/eeas/eu-statement-death-penalty_en.

[224] Japan is the only other industrial democracy that practices capital punishment. Japan conducted one execution in 2025, its first since 2022. *See* Kelly Ng, *Japan Executes "Twitter Killer" Who Murdered Nine*, BBC NEWS (Jun. 26, 2025), https://www.bbc.com/news/articles/c5y05dk2p92o. South Korea retains capital punishment in law but has effectively abolished capital despite recent symbolic calls for a death sentence. *See* Cad de Guzman, *South Korean Prosecutors Seek Death Penalty for Ex-President in Insurrection Case*, TIME (Jan. 14, 2026), https://time.com/7346064/south-korea-death-penalty-yoon-suk-yeol-insurrection-martial-law/. Israel abolished the death penalty for murder in 1954 and has only conducted one execution. *See* Smadar Ben-Natan, *The Shadow of the Death Penalty in Israel: Constructing Enemies, Citizens, and Victims*, *in* ELGAR COMPANION TO CAPITAL PUNISHMENT AND SOCIETY (2024).

[225] The Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR) commits ratifying states to the worldwide abolition of the death penalty; the European Convention on Human Rights, Protocols 6 and 13 prohibit executions in peacetime and in all circumstances, respectively; and the American Convention on Human Rights sharply restricts capital punishment and bars its expansion. *See* William A. Schabas, *International Law, Politics, Diplomacy and the Abolition of the Death Penalty*, 13 WM. & MARY BILL RTS. J. 417 (2004). *But see* Laurence E. Rothenberg, *International Law, US Sovereignty, and the Death Penalty*, 35 GEO. J. INT'L L. 547 (2003) (arguing that international law does not preclude capital punishment in the United States).

[226] Under the law of armed conflict, enemy soldiers may be lawfully killed only while actively participating in hostilities. Once a combatant has surrendered, been captured, or is incapable of fighting, international humanitarian law categorically forbids killing and requires humane treatment. *See* GENEVA CONVENTION (III) RELATIVE TO THE TREATMENT OF PRISONERS OF WAR, art. 13, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. The deliberate killing of a prisoner of war constitutes a grave breach and war crime. *See Id.*, art. 130.

F. Federalism and Respect for State Governments

Federalism supports allowing states to enact innovative criminal justice policies absent a contrary national consensus. LWOP is a useful example: it began as an innovation policy and became widely accepted over time. The same federalism principle, however, limits state autonomy once a national consensus emerges.

Uniformity in punishment matters because states do not operate in isolation. They must give full faith and credit to each other's judgments,[227] they extradite fugitives to sister states,[228] and they punish nonresidents for crimes committed within their borders.[229] These interstate realities require a shared baseline of acceptable punishments.

Enforcing national punishment standards is important because a state's use of capital punishment has consequences beyond that state's border. "The day is long gone when the United States could credibly argue that retention of the death penalty is a purely internal matter with no transnational repercussions."[230] The nation pays a price for retaining capital punishment while our peer nations have abolished it.[231] A state's treatment of its most powerless populations—particularly prisoners and detainees—is seen as a core indicator of whether human rights norms have been genuinely internalized rather than merely adopted rhetorically.[232] Additionally, state death penalties interfere with U.S. foreign relations when other countries refuse to extradite

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[227] *See* U.S. CONST., art. IV, § 1.

[228] *See Id.*, art. IV, § 2, cl. 2.

[229] See U.S. CONST., amend. VI (guaranteeing jury trial in state and district where crime was committed); *see also* Strassheim v. Daily, 221 U.S. 280, 284-85 (1911) (holding that a state may punish nonresident for acts done outside state that intentionally cause harm in state).

[230] Mark Warren, *Death, Dissent and Diplomacy: The US Death Penalty as an Obstacle to Foreign Relations*, 13 WM. & MARY BILL RTS. J. 309, 335 (2004); *see also* Serri Miller, *Can Congressional Foreign Affairs Power Justify a Juvenile Death Penalty Prohibition in the United States?*, 9 ILSA J. INT'L & COMP. L. 103 (2002) (arguing that Congress could prohibit juvenile death penalty to advance foreign policy interests).

[231] *See* Warren, *supra* note 230, at 311; ALAN WILLIAM CLARKE & LAURELYN WHITT, THE BITTER FRUIT OF AMERICAN JUSTICE: INTERNATIONAL AND DOMESTIC RESISTANCE TO THE DEATH PENALTY 2-3 (2007) (discussing growing international condemnation of American death penalty); Alan Clarke, *Terrorism, Extradition, and the Death Penalty*, 29 WM. MITCHELL L. REV. 783 (2002) (discussing international reluctance to extradite suspected terrorists to United States due to death penalty);

[232] *See* Michael Tonry, *Punishments, Politics, and Prisons in Western Countries*, 51 CRIME & JUST. 7, 7-8 (2022).

suspects who may face the death penalty here.[233] The few states that remain actively committed to capital punishment shape how the country as a whole is judged.

The national and international implications of capital punishment limit the extent to which states may inflict punishments based on local considerations. States have broad authority over criminal law, but they are not sovereign nations, free to enact policies they deem desirable. The States are like a family whose members must sometimes compromise their personal ambitions to maintain harmony and unity with other members. Proper respect for state authority goes both ways. The nation must respect state authority over their criminal laws and punishments, but states must also respect national standards of dignity and decency.[234] States have had considerable opportunity to impose death sentences, but there is now a thirty-two-state consensus against capital punishment for murder which all states participating in a national union should respect.

III. ORIGINALIST ARGUMENT AGAINST CAPITAL PUNISHMENT FOR MURDER

This Part advances an originalist argument against capital punishment for murder. The argument is surprisingly strong. As explained in Part I, originalism requires identifying the Eighth Amendment's original public meaning and then applying that enduring constitutional principle to present conditions. Although the meaning of "cruel and unusual punishment" was settled by the late eighteenth century, originalism does not freeze constitutional application to historical practices.[235]

Under an originalist approach, contemporary social values reflected in state laws and practices are not determinative. What matters instead is whether a punishment inflicts suffering that the Constitution forbids. At the Founding, execution for murder was tolerated in part because secure, permanent incarceration was unavailable. The added suffering caused by capital

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[233] *See* Mugambi Jouet, *The Day Canada Said No to the Death Penalty in the United States: Innocence, Dignity, and the Evolution of Abolitionism*, 55 U.B.C. L. REV. 439 (2022) (discussing Canada's refusal to extradite suspects to face the death penalty in Washington State).

[234] Some criticize this view of the Eighth Amendment, but it reflects due respect for federalism and state authority. *See*, *e.g.*, William W. Berry III, *Following the Yellow Brick Road of Evolving Standards of Decency: The Ironic Consequences of Death-is-Different Jurisprudence*, 28 PACE L. REV. 15, 22 (2007) (arguing that when courts adhere to objective criteria, "the Eighth Amendment can, at best, serve merely to limit the power of certain states to employ punishments departing from the norms of their fellow states.").

[235] *Bucklew*, 587 U.S. at 152 (Thomas, J., concurring).

punishment was necessary because it was unavoidable. Today, modern prison systems permit lifelong confinement without resorting to execution. Where a punishment once justified by necessity now inflicts suffering that can be avoided through less destructive means, the original constitutional principle forbids its continued use.

The Founding generation understood cruelty to encompass punishments that needlessly devastate innocent third parties, including the offender's family. The original meaning is not limited to the offender's experience of physical pain. This understanding is reflected in constitutional structure, early federal statutes, historical practices, and Founding-era commentary. When the State retains the capacity to punish murderers permanently without imposing death—and without inflicting predictable, avoidable suffering on families—capital punishment for murder becomes cruel under the Eighth Amendment's original public meaning.

A. Capital Punishment Was Necessary in Founding Era

Early America used capital punishment as a "last melancholy resource" because long-term incarceration was not feasible.[236] Secure prisons did not yet exist.[237] County jails were rudimentary and vulnerable to escape.[238] Without reliable confinement, punishment tended to be swift and severe, and authorities relied on "the most direct and the least expensive" sanctions.[239] Lacking the capacity to maintain individual criminal records, states branded offenses on the offender's body.[240] In this context, the Founders' reliance on corporal punishments, branding, maiming, and executions makes sense. For repeat offenders and serious crimes, capital punishment appeared to be the only solution; if they did not promptly execute a murderer, they had no choice but to release him back into society.[241]

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[236] J.M. Moynahan & Earle K. Stewart, *The Origin of the American Jail*, 42 FED. PROBATION 41, 44 (1978); Peter L. Feldman & James T. Huber, *Project: A Description of Prerelease in Pennsylvania*, 20 VILL. L. REV. 967, 969-70 (1975).

[237] Matthew W. Meskell, *An American Resolution: The History of Prisons in the United States from 1777 to 1877*, 51 STAN. L. REV. 839, 847 (1998).

[238] *See* Roth, *supra* note 82, at 13; George Fisher, *The Birth of the Prison Retold*, 104 YALE L.J. 1235, 1239 (1995).

[239] Moynahan & Stewart, *supra* note 236, at 43; Meskell, *supra* note 237, at 841-42.

[240] Nicholas J. Berwick, *Viral Shaming Punishments and the Eighth Amendment*, 35 ALB. L.J. SCI. & TECH. 105, 107-09 (2024).

[241] Roth, *supra* note 82, at 13; Rothman, *supra* note 69, at 102 ("capital punishment had to compensate for all the weaknesses in the criminal justice system").

B. Capital Punishment Now Causes Unnecessary Suffering

The Eighth Amendment's original principle prohibits unnecessary pain and suffering. The preceding section demonstrates that the prohibition of cruel and unusual punishments is not narrowly concerned with the offender's sensory experience, but also the suffering that descends upon the offender's innocent family members if he is killed.

The original principle does not change, but facts do. Faithful adherence to the original principle of not inflicting additional, unnecessary pain may lead to a different result when the state of the world changes. What has changed is the state's capacity to permanently imprison those who murder.

Modern states have the capacity to permanently imprison murderers. Execution is therefore unnecessary for incapacitation; a murderer sentenced to LWOP will die in custody.[242] Our modern capacity to permanently imprison offenders makes capital punishment for murder cruel for the same reason that the Founders thought it was cruel for the British Monarchy to make petty property crimes punishable by death. The Republic and Monarchy both have the power to take lives, but the former kills only when necessary while the later kills when death is unnecessary.[243] Under modern facts, the necessity rationale for execution collapses: when secure lifelong incapacitation is available, execution becomes avoidable suffering—and thus cruel.

The collateral consequences of punishment, familiar to the Framers, remain relevant today. Incarceration burdens families, but those harms are largely unavoidable.[244] Life imprisonment may

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[242] Baze v. Rees, 553 U.S. 35, 78 (2008) (Stevens, J., concurring). It is possible that some residual risks remain—escape attempts, in-prison violence, or directing crime from custody—but such cases are rare, and death row inmates are not uniquely dangerous. *See* Mark D. Cunningham & Mark P. Vigen, *Death Row Inmate Characteristics, Adjustment, and Confinement: A Critical Review of the Literature*, 20 BEHAV. SCI. & L. 191, 202-04 (2002). Maximum-security facilities can manage those risks through surveillance, restrictive housing, loss of privileges, and limits on communication and visitation. *See* Chan Vachiradath, *The Efficacy of Technology in Preventing the Escape of Inmates in Prison*, 8 J. APP. SECURITY RSCH. 477 (2013); Bryce E. Peterson, *Catch 'Em If You Can: Examining How Often and How Quickly People Who Escape from Prisons and Jails Are Recaptured*, 37 SECURITY J. 1123 (2024) (reporting that those who escape jails and minimum-security prisons take longer to recapture).

[243] *See supra* Section I.C.

[244] Imprisonment is presently necessary, but this could change. Researchers may one day discover effective treatments for criminal behavior. *See* Henry T. Greely & Nita A. Farahany, *Neuroscience and the Criminal Justice System*, 2 ANN. REV. CRIMINOL. 451 (2019) (discussing implications of neuroscience for criminal law); Kent A. Kiehl & Morris B. Hoffman, *The Criminal Psychopath: History, Neuroscience, Treatment, and Economics*, 51 JURIMETRICS 355 (2011) (discussing advances in diagnosis and treatment of criminal psychopaths); Alison Evans Cuellar et al., *A Cure for Crime: Can Mental Health Treatment Diversion Reduce Crime Among Youth?*, 25 J. POL'Y ANALYSIS & MGMT. 197 (2006) (reporting effectiveness of early mental health treatment in reducing recidivism). If a future cure

be a necessary punishment, but the additional punishment of death causes unnecessary pain and suffering for the offender's innocent family members.

Death row uniquely intensifies the trauma of incarceration for families.[245] A death sentence imposes a stigma that radiates outward to innocent family members, echoing the hereditary taint the Framers repudiated.[246] Death row exacerbates harm to families—especially children—through prolonged uncertainty, isolation, stigma, and repeated exposure to the threat of execution.[247] Children may be shunned or bullied, as if criminality were inherited.[248] Most will suffer clinical depression and traumatic stress disorders.[249] First-person accounts describe being "marked," enduring shame at school and work, and feeling that the sentence stains descendants as well as the condemned.[250] Remote locations and restrictive visitation practices further limit contact, often making family relationships harder to sustain than under LWOP.[251]

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for criminality makes prisons unnecessary, imprisonment would be unnecessary and cruel, except for those who are incurable or refuse treatment.

[245] *See* Elizabeth Beck & Sandra J. Jones, *Children of the Condemned: Grieving the Loss of a Father to Death Row*, 56 OMEGA: J. DEATH & DYING 191 (2008); Sandra J. Jones & Elizabeth Beck, *Disenfranchised Grief and Nonfinite Loss as Experienced by the Families of Death Row Inmates*, 54 OMEGA: J. DEATH & DYING 281 (2007); ELIZABETH BECK et al., IN THE SHADOW OF DEATH: RESTORATIVE JUSTICE AND DEATH ROW FAMILIES 51-73 (2007); Rachel King, *No Due Process: How the Death Penalty Violates the Constitutional Rights of the Family Members of Death Row Prisoners*, 16 BU PUB. INT. LJ 195 (2006).

[246] Death sentences inflict unnecessary suffering in a manner analogous to bills of attainder, but capital punishment statutes are not bills of attainder against family members because they do not specifically identify family members for formal punishments. *See* Selective Service System v. Minn. Pub. Interest Research Grp., 468 U.S. 841, 847 (1984) (defining elements of bills of attainder).

[247] *See* Jennifer Schweizer & Elizabeth Beck, *The Death Penalty From the Family Perspective*, *in* SOCIAL WORK, CRIMINAL JUSTICE, AND THE DEATH PENALTY (Lauren A. Ricciardelli ed. 2020).

[248] *See* Nat'l Child Traumatic Stress Network, *Children Who Are Impacted by a Family Member's Death Sentence or Execution: Information for Mental Health Professionals* (2021), https://www.nctsn.org/sites/default/files/resources/fact-sheet/children-who-are-impacted-by-a-family-members-death-sentence-or-execution-for-mh-professionals.pdf;

[249] *See* Schweizer & Beck, *supra* note 247, at 196.

[250] SANDRA JOY, GRIEF, LOSS, AND TREATMENT FOR DEATH ROW FAMILIES: FORGOTTEN NO MORE (2013).

[251] *See* Sophia Laurenzi, *Death Row Families Are the Hidden Victims of the U.S. Death Penalty*, PRISM REPORTS (Aug. 1, 2024), https://prismreports.org/2024/08/01/death-row-families-hidden-victims-death-penalty; BECK et al., *supra* note 245, at 139-56 (discussing how commutation of death sentences to life imprisonment reduces family suffering).

Execution imposes a permanent loss on children, partners, parents, and siblings—functionally akin to the archaic punishment of forfeiture.[252] State execution affects the offender's family in much the same way as murder affects the victim's family, but the offender's family members do not receive sympathy or emotional support. As one mother explained, "I got depressed when I lost my daughter [in a traffic accident], but I came out of it. I can't come out of this."[253] Although some assume families are better off without contact, research suggests children generally fare better when they can maintain a relationship with an incarcerated parent.[254]

Some might argue that adding the threat of impending execution to permanent imprisonment advances some legitimate penological interests, such as deterrence and retribution, or that states legislatures should decide whether it is necessary to inflict more pain than permanent incapacitation. If democratic legislatures could always be trusted not to authorize cruel punishments, the Eighth Amendment would be unnecessary.[255] Indeed, if legislatures could be trusted not to use power for unlawful purposes, no laws would be necessary.[256] History provides many examples of the cruel impulses of government with the lowly criminal being a prime target for abuse.[257] Cruel and unusual punishments are not prohibited because they fail rational basis review. Torturous punishments may serve some legitimate objectives, such as deterrence and

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[252] *See* Megan Comfort, *Punishment Beyond the Legal Offender*, 3 ANNU. REV. LAW SOC. SCI. 271 (2007); MEGAN COMFORT, DOING TIME TOGETHER: LOVE AND FAMILY IN THE SHADOW OF THE PRISON (2019); Zachary Hoskins, *Punishment's Burdens on the Innocent*, 42 J. APP. PHIL. 691 (2025).

[253] Quotation in BECK et al., *supra* note 245, at 10.

[254] *See* Jonathon J. Beckmeyer & Joyce A. Arditti, *Implications of In-Person Visits for Incarcerated Parents' Family Relationships and Parenting Experience*, 53 J. OFFENDER REHAB. 129 (2014); Jessica Terkovich, *Living with the Dying: Visitation Rights of Children Whose Parents Have Been Condemned to Death*, 13 U. ARK. LITTLE ROCK J. SOC. CHANGE 1 (2023); Clare-Ann Fortune & Karen Salmon, *Families, Parenting, and Visits in Prison*, *in* WILEY INTERNATIONAL HANDBOOK OF CORRECTIONAL PSYCHOLOGY (2019).

[255] *See* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1896 (1833).

[256] As James Madison famously observed, "If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions." THE FEDERALIST NO. 51 (1788).

[257] *See*, *e.g.*, Lawrence O. Gostin, *Biomedical Research Involving Prisoners: Ethical Values and Legal Regulation*, 297 J. AM. MED. ASS'N 737 (2007) (discussing history of secret medical experiments on American prisoners); Brenda V. Smith, *Sexual Abuse of Women in United States Prisons: A Modern Corollary of Slavery*, 33 FORDHAM URB. LJ 571 (2005) (discussing sexual abuse of women in custody throughout American history).

retribution, yet they are prohibited.[258] The Amendment commits the nation to principles which distinguish a republic from a monarchy: necessity, restraint, and respect for human dignity. Whatever the appeal of retributive symmetry, deliberately inflicting unnecessary suffering is cruel and constitutionally forbidden.[259]

IV. EFFECT OF PROHIBITING CAPITAL PUNISHMENT FOR MURDER

Having concluded that capital punishment for murder violates the Eighth Amendment under both contemporary standards of decency and the Amendment's original public meaning, this Part addresses the practical and institutional consequences of that conclusion. Specifically, this Part examines the implications for (1) future murder prosecutions, where life imprisonment remains available as the most severe sanction; (2) federal capital statutes, which address a distinct and limited set of offenses; and (3) individuals currently sentenced to death, whose sentences would be commuted to life without parole. Far from destabilizing state criminal justice systems, recognizing the unconstitutionality of capital punishment for murder would resolve longstanding uncertainty, reduce the extraordinary burdens associated with capital litigation, and bring constitutional doctrine into alignment with contemporary practice.

A. Current and Future Prosecutions

The practical implications for current criminal prosecutions are modest because death sentences are now rare. It would rarely change charging or sentencing strategies.[260] The few states that still impose death sentences would instead impose life sentences, as most states—and nearly all peer nations—already do.

A consensus against death for murder would not necessarily bar death for other, exceptional crimes (e.g., state treason or terrorist attacks on government). These offenses, though sometimes

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[258] BLACKSTONE, *supra* note 15, at *375-76 (discussing the rationales offered for punishing, even executing, an offender's innocent children).

[259] *See* Ford v. Wainwright, 477 U.S. 399, 409 (1986) (condemning the "barbarity of exacting mindless vengeance"); *Santiago*, 122 A.3d at 71-73 (holding that vengeance is not a legitimate state interest).

[260] It is possible that prosecutors threaten to seek the death penalty to induce defendants to accept life sentences in murder cases. However, empirical evidence suggests that death-notice cases take longer to complete and substantially raise the costs of prosecution. *See* Nicholas Petersen & Mona Lynch, *Prosecutorial Discretion, Hidden Costs, and the Death Penalty: The Case of Los Angeles County*, 102 J. CRIM. L. & CRIMINOLOGY 1233 (2012).

involving homicide, require additional elements and arise rarely. Limited use weighs most strongly against death for murder because states face abundant murder prosecutions yet rarely seek death; it says far less about treason or terrorism, which states rarely encounter. For such rare crimes, the only clear "objective indicia" are the twenty-three states that prohibit capital punishment altogether. Twenty-three states do not constitute a national consensus under the Court's precedents.

The objective-indicia approach also permits consensus to move in the opposite direction. As Chief Justice Roberts notes, "Mercy toward the guilty can be a form of decency[.] … But decency is not the same as leniency. A decent society protects the innocent from violence. A mature society may determine that this requires removing those guilty of the most heinous murders from its midst, both as protection for its other members and as a concrete expression of its standards of decency."[261] This feature of following contemporary standards of decency may affect future prosecutions.

At present, state support for making non-homicide crimes capital offenses remains too thin to overcome existing precedent, but standards can evolve. A small but growing number of states have signaled their support for executing those who rape children.[262] The scientific views of adolescent development that inspired changed approaches to juvenile offenders in *Miller* and *Graham* may also motivate states to impose greater punishment on those who destroy adolescent minds through sexual violence.[263] One may reasonably consider raping a child as a worse offense than murder given that the Eighth Amendment categorically prohibits torture but not killing.[264] State legislatures may express this position by enacting statutes or resolutions that condition the

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[261] *Miller*, 567 U.S. at 494-95 (Roberts, C.J., dissenting).

[262] *See* Alexandra L. Klein, *Kennedy v. Louisiana and the Future of the Eighth Amendment*, 52 PEPP. L. REV. 293, 363-66 (2025) (discussing possibility of states creating a national consensus to sentence child rapists to death); Rosemary Ardman, *Child Rape and the Death Penalty*, 61 IDAHO L. REV. 159, 161-62 (2025); Monica C. Bell, *Grassroots Death Sentences: The Social Movement for Capital Child Rape Laws*, 98 J. CRIM. L. & CRIMINOL. 1 (2007).

[263] Sexual violence against children may be a root cause of murder: nearly all death row inmates were victims of childhood sexual abuse. *See* David Lisak & Sara Beszterczey, *The Cycle of Violence: The Life Histories of 43 Death Row Inmates*, 8 PSYCH. MEN & MASCULINITY 118, 122-25 (2007) (reporting that all inmates studied suffered neglect, nearly all physically abused, more than half sexually abused, and substantial number "subjected to forms of sadism, public humiliation, and the unique degradation of being punished for manifesting the symptoms of an abused child"); David Freedman & David Hemenway, *Precursors of Lethal Violence: A Death Row Sample*, 50 SOC. SCI. & MED. 1757 (2000) (reporting family violence history in all cases, and severe physical and sexual abuse in all but two cases).

[264] *See* Sonja Grover, *Child Rape as a Crime Against Humanity: Challenging the United States Supreme Court Reasoning in Kennedy v. Louisiana*, 13 INT'L J. HUM. RTS. 668 (2009). Interestingly, the originalist principle may foreclose this possibility because the necessity of punishment is a matter of state capacity, not popular opinion.

punishment on a future determination that it is constitutional.[265] Such measures would clearly communicate state values without directly confronting existing precedents.

B. Death Penalty for Federal Crimes

Following the contemporary standards of decency approach, state practice can establish a consensus that binds states, but not necessarily the federal government when it acts under uniquely federal powers. Federal law authorizes capital punishment for both homicide and non-homicide offenses.[266] Even if death for murder is unconstitutional, some federal offenses would remain punishable by death because a state-based consensus speaks only to punishments within state authority and not uniquely federal offenses.[267]

The federal government may prosecute some murders that occur outside the jurisdiction of any state, such as a fatal attack on a U.S. vessel at sea,[268] the killing of a U.S. national outside the United States,[269] or killing within an exclusive federal enclave.[270] Additionally, the federal government may prosecute homicide offenses based on concurrent jurisdiction with state governments.[271] For example, if a fatal shooting occurs during the robbery of an FDIC-insured bank, there is overlapping jurisdiction because the crime harms federally insured banks and

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[265] To show support for capital punishment for raping a child, states do not need to enact unconstitutional legislation and subject themselves to costly litigation. Instead, state legislatures may pass resolutions to signal their support, or enact laws that take effect if the Court permits executing child rapists. States did this with laws restricting access to abortions. *See* Jeffrey Omar Usman, *State Legislatures and Solving the Eighth Amendment Ratchet Puzzle*, 20 U. PA. J. CONST. L. 677 (2017); Matthew Berns, *Trigger Laws*, 97 GEO. L.J. 1639 (2008).

[266] Charles Doyle, *Federal Capital Offenses: An Overview of Substantive and Procedural Law,* CONG. RESEARCH SERVICE (Jul. 5, 2023), https://www.congress.gov/crs_external_products/R/PDF/R42095/R42095.13.pdf (describing three categories of death-eligible federal offenses: homicide offenses, espionage and treason, and certain drug offenses).

[267] *But see* Freedman, *supra* note 9, at 1727-37 (arguing that there is a national consensus against the federal death penalty).

[268] *See* 18 U.S.C. § 2280(a)(1)(H) (making homicide at sea a capital offense); 18 U.S.C. § 2281 (making a fatal attack on a maritime platform punishable by death).

[269] *See* 18 U.S.C. § 2332(a)(1).

[270] *See* U.S. CONST., art. I, § 8, cl. 17 (authorizing Congress to legislate for places under federal jurisdiction, such as forts, arsenals, the District of Columbia).

[271] *See* Paul Mysliwiec, *The Federal Death Penalty as a Safety Valve*, 17 VA. J. SOC. POL'Y & L. 257 (2009).

interstate commerce.[272] Federal homicide laws can also apply when certain federal officials are killed.[273]

To determine whether the national consensus against capital punishment for murder bars the federal government from pursuing the death penalty, one would ask whether the federal offense has a state-law homicide analogue. Federal homicide prosecutions, whether based on exclusive or concurrent jurisdiction, are functionally equivalent to homicide prosecutions under state law. Contemporary national standards, as established by state laws and practices, indicate that these crimes should not be punishable by death. These killings cannot be punished by death through recourse to treason or terrorism statutes because those offenses address war-like betrayal of the sovereign or coercive violence against the state, not the taking of a human life as such. Even if there are some separate and unique federal interests in these cases, the core offense of homicide does not warrant a death sentence.

Under federal law, certain offenses endanger national security and the federal government itself and are punishable by death even though no death occurs. Federal non-homicide crimes punishable by death include treason against the United States,[274] espionage,[275] political terrorism and attacks,[276] and war crimes.[277] Another set of federal laws makes certain military offenses

[272] *See* 18 U.S.C. § 2113(f)-(h).

[273] Under federal law, it is a capital crime to murder a federal official. *See* 18 U.S.C. § 351 (covering Members of Congress, judges, and federal executive officials); 18 U.S.C. § 1751 (covering the President, Vice-President, and major presidential candidates); 18 U.S.C. § 1114 (covering federal officers and employees "engaged in or on account of the performance of official duties"); 18 U.S.C. § 115(b) (making retaliatory killing of a family member of a federal official punishable by death); 18 U.S.C. § 3591(b)(2) (protecting officers, jurors, and witnesses in federal prosecution of a continuing criminal enterprise).

[274] *See* 18 U.S.C. § 2381.

[275] *See* 18 U.S.C. § 794(a)-(b).

[276] *See* 18 U.S.C. § 2332a (making the use of weapons of mass destruction resulting in death punishable by death); 18 U.S.C. § 844 (making the transportation or use of explosives resulting in death punishable by death).

[277] *See* 18 U.S.C. § 2441(a).

punishable by death without an intentional killing, such as desertion in wartime,[278] mutiny or sedition,[279] misbehavior before the enemy,[280] spying,[281] and aiding the enemy.[282]

State laws and practices do not address the appropriate punishment for national security crimes and military offenses. While states may make treason against the state a criminal offense, states have no authority over national defense, federal officials, or the transmission of classified information and defense secrets. States may prosecute soldiers in civilian courts for violating general criminal statutes, including murder,[283] but they cannot prosecute soldiers for military offenses that are subject to courts-martial.[284] Congress has sole and exclusive authority for military rules and regulations.[285] The national consensus against capital punishment for murder, therefore, does not prohibit capital punishment for a narrow category of federal non-homicide crimes.

If state laws and practices do not address the propriety of imposing death sentences for certain federal non-homicide offenses, how should we judge whether those federal laws inflict cruel and unusual punishments? The primary indicia of contemporary support for making these crimes punishable by death are federal laws which make certain non-homicide offenses punishable by death. Statutory authorization is insufficient if the federal government does not impose capital punishment for these offenses when they arise, but the rarity of these offenses would explain their limited use. The arguments for and against imposing death sentences for rare federal non-homicide crimes should be directed to Congress as the institution responsible for setting national policy.

The originalist approach suggests further narrowing of federal crimes punishable by death. When an offender is effectively incapacitated, the federal government should not inflict further suffering on the offender's relatives by killing him. One could argue that some capital offenses,

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[278] *See* 10 U.S.C. § 885.

[279] *See* 10 U.S.C. § 894(b).

[280] *See* 10 U.S.C. § 899.

[281] *See* 10 U.S.C. § 903.

[282] *See* 10 U.S.C. § 903b.

[283] State court jurisdiction over nonmilitary offenses is not exclusive. Military courts may also try active-duty service members for stateside murders unrelated to service during peacetime. *See* Solorio v. United States, 483 U.S. 435, 450-51 (1987); Loving v. United States, 517 U.S. 748, 752-54 (1996).

[284] Chappell v. Wallace, 462 U.S. 296, 300 (1983).

[285] U.S. CONST., art. I, § 8, cl. 14; Chappell v. Wallace, 462 U.S. 296, 300-01 (1983).

like treason, espionage, mutiny, sedition, and aiding the enemy prove the offender is always a public security threat, requiring the government to resort to capital punishment.[286]

As discussed above, the Constitution permits some use of capital punishment, but the Eighth Amendment compels us to narrow the list of capital offenses as the nation's Founders did. Following either of the leading forms of constitutional analysis, a narrow set of federal offenses that implicate national security should remain punishable by death while the punishment for murder is limited to life imprisonment. This conclusion brings capital punishment into better alignment with both contemporary standards of decency and the original meaning of the Eighth Amendment.

C. Past Death Sentences

Recognizing that a national consensus now exists against capital punishment for murder forces us to reckon with sentencing decisions made twenty, thirty, or even forty years ago. What becomes of death sentences imposed under conditions that no longer reflect contemporary judgment? It may be tempting to ignore past sentences and let nature run its course, but we should instead confront the situation directly.

A determination that the Eighth Amendment forbids capital punishment for a type of offense or offender applies retroactively because it announces a substantive rule.[287] A rule is substantive when it "prohibits a certain category of punishment for a class of defendants because of their status or offense."[288] Such changes "must be retroactive" because they alter the range of legally permissible punishments rather than the procedures for imposing them.[289] Categorical death-penalty decisions apply retroactively on state and federal collateral review, and states may not conduct executions that contravene contemporary standards of decency.[290]

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[286] For this reason, Beccaria acknowledge that it may be necessary to punish treason with death. See BECCARIA, *supra* note 80, at *103-04.

[287] Schriro v. Summerlin, 542 U.S. 348, 352 (2004). Finding capital punishment for murder unconstitutional does not raise an ex post facto concern because it does not increase the severity of a punishment or retroactively criminalize conduct.

[288] Montgomery v. Louisiana, 577 U.S. 190, 208 (2016) (quoting *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989)).

[289] *Id.* at 208–09.

[290] *See Penry*, 492 U.S. at 329-30.

If the death penalty for murder were constitutionally prohibited, the immediate practical consequence would be the reduction of all existing death sentences to LWOP. State and federal prison systems would then reassign several thousand prisoners who are currently housed in death-row units to long-term or maximum-security housing. Experience in abolition states suggests the transition is primarily administrative (i.e., classification, transfers, staffing),[291] not a systemic security risk.[292] Former death-row prisoners are typically placed in high-security units, and states save substantial costs by eliminating death-row housing and litigation.[293]

CONCLUSION

State governments bear primary responsibility for prosecuting crime and, consistent with that authority, may adopt innovative criminal justice policies so long as those practices remain consistent with constitutional limits. At the end of the twentieth century, a national consensus supported capital punishment for murder, and many states employed the death penalty as a central crime-control strategy. That consensus has since eroded. In the twenty-first century, a growing majority of states have abolished capital punishment or ceased imposing it in practice, and only a small number of jurisdictions continue to authorize and actively impose death sentences for murder.

The Eighth Amendment permits states to experiment, but it does not permit them to persist in practices that the Nation has rejected. Where objective indicia demonstrate a national consensus against a particular punishment for a particular offense, the Constitution requires conformity to evolving standards of decency. As this Article has shown, both contemporary practice and the Eighth Amendment's original meaning now converge on the same conclusion: capital punishment for murder is no longer constitutionally permissible.

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[291] *See* James R. Acker & Brian W. Stull, *Life After Sentence of Death: What Becomes of Individuals Under Sentence of Death After Capital Punishment Legislation Is Repealed or Invalidated*, 54 AKRON L. REV. 267 (2020).

[292] *See* Cunningham & Vigen, *supra* note 242, at 202-04 (reporting that death-row prisoners generally adapt to long-term, high-security routines without extraordinary difficulty).

[293] *See* Philip J. Cook, *Potential Savings from Abolition of the Death Penalty in North Carolina*, 11 AM. L. & ECON. REV. 498 (2009); Jolie McLaughlin, *The Price of Justice: Interest-Convergence, Cost, and the Anti-Death Penalty Movement*, 108 NW. U.L. REV. 675 (2013); Marla D. Tortorice, *Costs Versus Benefits: The Fiscal Realities of the Death Penalty in Pennsylvania*, 78 U. PITT. L. REV. 519 (2016).

Recognizing the unconstitutionality of capital punishment for murder would also carry significant institutional benefits. Capital cases consume extraordinary judicial resources, generate prolonged litigation, and impose heavy burdens on courts, counsel, and victims' families, often for decades. Commuting existing death sentences to life without parole would resolve a large body of protracted litigation while preserving the state's strongest legitimate interests in punishment and public safety.

Finally, narrowing the scope of capital punishment to offenses that implicate the most fundamental national interests—if it remains available at all—would align constitutional doctrine with contemporary practice and public expectations. Executions carried out decades after the offense, imposed in only a handful of jurisdictions, and applied to aging prisoners undermine confidence in the fairness and rationality of the criminal justice system. By recognizing the constitutional limits of capital punishment for murder, courts can bring coherence to Eighth Amendment doctrine while allowing the Nation's long experiment with the death penalty to conclude in a principled and legally grounded manner.