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正本



# 法規範憲法審查聲請陳報書

案號：會台字第 12487 號

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| 聲請人 | 廖敏貴 | 住詳卷 |
| 訴訟代理人 | 李艾倫律師 | 法律扶助基金會 |



**為聲請法規範憲法審查，陳報事：**

一、 茲敬提美國人權倡議者協會（The Advocates for Human Rights）就本案之專家意見書（附件 6）及其中文翻譯（附件 7）。

二、 人權倡議者協會成立於 1983 年，係一總部位於美國之非政府組織。該協會於 1991 年正式承諾於全世界範圍內反對死刑，義務援助定罪後上訴案件之救濟，並倡議廢除死刑。目前為世界反死刑聯盟（World Coalition against the Death Penalty）執委會成員，積極協調世界反死刑聯盟於聯合國之倡議活動。

三、 人權倡議者協會出具之專家意見書，係由台灣廢除死刑推動聯盟提供予聲請人參考，並向 鈞庭提出。意見書之內容主要說明美國死刑制度相關資訊，簡述如下：

（一）美國目前的趨勢：

越來越多州完全廢除死刑；越來越多州在法律上或實際上暫停執行死刑；陪審團極少判處死刑；實際執行死刑的司法轄區持續下降；僅少數州內少數的郡執行死刑；過去五年來僅八州和聯邦政府執行過死刑。

（二）美國對死刑的支持率逐漸下降：

引用研究指出民調若採簡單二元問題方式，可能會誇大死刑的支持率，而廢除死刑後，死刑支持率會隨時間逐漸降低。美國

整體趨勢顯示，死刑支持率逐漸下降；有死刑的州，死刑支持率也下降；僅47%的人認為死刑在實務上公平適用，78%的人認為無辜的人有被執行的風險；民眾的不信任來自每年都有死囚最終無罪釋放的案例。

（三）許多廢死的州是透過立法來廢除死刑。其他廢死的州則是透過法院裁判，在法院判決後，或由州立法機關採取行動，確認在法律上廢除死刑，或由立法機關拒絕制定新的死刑法，形成事實上廢除死刑。

（四）法院宣布死刑無效時，原因主要可分為兩大論述：

1. 死刑制度無法避免恣意剝奪生命，因此死刑是酷刑而違反憲法。
2. 死刑不一樣，與其他刑罰不僅在程序上的不同，更在種類的不同。法院強調死刑的不可回復性、潛在誤判與冤案風險，以及死刑摧毀被執行者的所有其他權利。

四、 綜上，敬請 鈞庭鑒核。

此致

憲法法庭　公鑒

**附屬文件之名稱及其件數**

| 附件編號 | 文件名稱或內容 | 頁碼 |
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| 7 | 美國人權倡議者協會之專家意見之中譯文 | 14 |

中　華　民　國　113　年　4　月　17　日

具　狀　人：廖敏貴

撰　狀　人：李艾倫律師

IN THE CONSTITUTIONAL COURT

BETWEEN:

WANG XIN-FU AND 36 OTHERS — PETITIONERS

-and-

THE MINISTRY OF JUSTICE — RESPONDENTS

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BRIEF OF AMICUS CURIAE THE ADVOCATES FOR HUMAN RIGHTS IN SUPPORT OF THE PETITIONERS

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## 1. The Advocates for Human Rights

**The Advocates for Human Rights** (The Advocates) is a volunteer-based nongovernmental organization committed to the impartial promotion and protection of international human rights standards and the rule of law. Established in 1983 and based in the United States, The Advocates conducts a range of programs to promote human rights in the United States and around the world, including monitoring and fact finding, direct legal representation, education and training, and publications. In 1991, The Advocates adopted a formal commitment to oppose the death penalty worldwide and organized a death penalty project to provide pro bono assistance on post-conviction appeals, as well as education and advocacy to end capital punishment. The Advocates currently holds a seat on the Steering Committee of the World Coalition against the Death Penalty, chairs the World Day Against the Death Penalty Working Group, and plays an active role in coordinating the Coalition's advocacy at the United Nations. The Advocates holds special consultative status with the United Nations Economic and Social Council (ECOSOC).

## 2. Introduction

In the United States, the number of states using the death penalty is consistently decreasing, and within those states a vanishingly small number of counties sentence people to death. A country of more than 335 million people,[1] with more than 1.2 million people incarcerated, executes fewer than 25 people a year.[2]

Public support for the death penalty typically declines *after* abolition as "*more and more citizens come to regard it as a punishment of the past.*"[3] Judges and legislators should rest assured that when they follow the courage of their convictions and apply the law faithfully, with time, public opinion is likely to accept and embrace their decision to abolish the death penalty.

Public support for the death penalty across the United States is currently at a five-decade low, with only 53 percent of the population supporting it as a penalty for murder, down from 80 percent thirty years ago and 65 percent fifteen years ago.[4] Even more notably, only 47 percent of the population believe that the death penalty is fairly applied in practice,[5] and 78 percent of the population believe that there is some risk of innocent people being put to death.[6] This public mistrust is well-placed; courts exonerate people on death row every year.[7]

Reflecting this decline in public support, more and more States are abolishing the death penalty, with 23 States and the District of Columbia having formally abolished the death penalty, and only 8 States and the Federal Government having executed anyone in the last 5 years. At a more granular level, only a tiny fraction of counties are responsible for death sentences that result in executions.

Courts in the United States offer a variety of reasons for abolishing the death penalty, but those decisions rest on two overarching arguments: first, there is no system under which the death penalty can imposed in a non-arbitrary way; and second, "*death is different*" and unlike any other punishment, not just in degree but in kind. Rooted in these principles, courts have found, and continue to find, that "*the death penalty experiment has failed*"[8] and it must be abolished entirely.

## 3. Current Trends in the United States

Authorities in the United States are abandoning the death penalty, and clear empirical evidence demonstrates this trend in five distinct ways: (i) first, an increasing number of states have

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[1] https://www.cbsnews.com/news/us-population-expected-to-top-335-million-by-new-years-day-2024/.
[2] https://bjs.ojp.gov/library/publications/prisons-report-series-preliminary-data-release.
[3] See Hoyle C., "Crude Opinion Polls on the Death Penalty Distort Public Debate", August 28, 2023 available https://blogs.law.ox.ac.uk/death-penalty-research-unit-blog/blog-post/2023/08/crude-opinion-polls-death-penalty-distort-public.
[4] https://news.gallup.com/poll/513806/new-low-say-death-penalty-fairly-applied.aspx.
[5] https://news.gallup.com/poll/513806/new-low-say-death-penalty-fairly-applied.aspx.
[6] https://www.pewresearch.org/politics/2021/06/02/most-americans-favor-the-death-penalty-despite-concerns-about-its-administration/.
[7] See https://deathpenaltyinfo.org/database/innocence?sort=exonerationYear/desc (last accessed March 5, 2024).
[8] *Callins* v. *Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting).

abolished the death penalty entirely; (ii) second, an increasing number of states have imposed *de jure* or *de facto* moratoria; (iii) third, juries impose very few death sentences; (iv) fourth, very few jurisdictions actually carry out executions; and (v) finally, those executions come not only from a very small number of states, but from a very small handful of counties within those states.

We take these in turn.

(i) Capital Punishment Recently Abolished in Many States

23 of the 50 states and the District of Columbia have formally abolished the death penalty.[9] A flurry of States have abolished capital punishment in the last 8 years, namely **Delaware** in 2016 by judicial decision[10]; **Washington** in 2018 by judicial decision[11] with legislation then passed confirming the abolition of the death penalty in 2023[12]; **New Hampshire** in 2019 by legislation[13]; **Colorado** in 2020 by legislation[14]; and most recently **Virginia** in 2021.[15]

(ii) Increasingly States are Imposing Moratoria or Not Seeking Capital Punishment

In addition to the 23 States and the District of Columbia that have abolished the death penalty, 8 States are currently subject to moratoria:

- In January 2023, **Arizona's** governor, Katie Hobbs, established a Death Penalty Independent Review Commission[16] and issued a moratorium preventing executions during the pendency of that Commission.[17]

- **California** carried out its last execution 18 years ago,[18] and in 2019, the Governor issued an executive order placing a moratorium on executions, declaring that the death penalty is "unfair, unjust, wasteful, protracted and does not make [the] state safer."[19] In January 2022, the Governor further announced that the state's death row would be dismantled and all people housed there would be transferred to other prisons.[20]

- **Kentucky** has executed only three people since 1976, with the last execution in 2008. Since 2010, various courts have found that the state's death penalty protocol is

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[9] See https://deathpenaltyinfo.org/states-landing (last accessed March 5, 2024).
[10] By judicial decision in *Rauf* v. *State*, 145 A.3d 430 (Del. 2016).
[11] *State* v. *Gregory*, 427 P.3d 621 (Wash. 2018).
[12] With the passage of SB 5087, which became law on July 23, 2023.
[13] With the passage (including override of the Governor's veto) of HB 455.
[14] With the passage of SB20-100. The legislation was not retroactive, but the Governor granted clemency to the three individuals who remained on death row.
[15] With the passage of H2263. Two prisoners who were on death row had their sentences commuted.
[16] https://azgovernor.gov/office-arizona-governor/executive-order/2023-05 (last accessed March 5, 2024).
[17] https://apnews.com/article/execution-arizona-katie-hobbs-f0c799c2a2699944741l9bd38d5996a1 (last accessed March 5, 2024).
[18] https://www.cdcr.ca.gov/capital-punishment/inmates-executed-1978-to-present/ (last accessed March 5, 2024).
[19] https://www.gov.ca.gov/wp-content/uploads/2019/03/3.13.19-EO-N-09-19.pdf (last accessed March 5, 2024).
[20] https://apnews.com/article/california-death-row-closed-prisons-gavin-newsom-d59ac606239abadb2dfa03be71e54649?utm_medium=AP&utm_campaign=SocialFlow&utm_source=Twitter (last accessed March 5, 2024).

unconstitutional.[21] In 2020, the state's Department of Corrections established a working group to review and amend the death penalty protocol,[22] but until authorities implement such changes and courts rescind current orders, Kentucky's death penalty remains on hold.

- **Montana** carried out its last execution in 2006, and that execution was only the state's third since 1976. A 2015 court order enjoins Montana from executing anyone under the state's current execution protocol.[23]

- **Ohio** has not carried out any executions since 2018,[24] and in 2020 the Republican Governor, Mike DeWine, imposed an "unofficial moratorium" on executions.[25] The Governor has also issued reprieves for inmates who were due to be executed, delaying any possible executions for at least a number of years.[26]

- Authorities in **Oregon** have carried out only two executions since 1978 (in 1996 and 1997), and the state has had a formal moratorium since 2011.[27] In 2019, the legislature passed a bill further restricting the potential use of the death penalty,[28] and in 2022, the Governor commuted the sentences of the remaining 17 people who were on death row to life imprisonment.[29]

- **Pennsylvania** has executed only three people since 1976, with two executions in 1995 and one in 1999.[30] There has been a formal moratorium in place since February 2015.[31]

- The last execution in **Tennessee** took place in February 2020,[32] but the state paused executions during the COVID pandemic, and in 2022 the Governor put in place a moratorium.[33]

Moreover, of the 19 states that retain the death penalty and do not have a moratorium, 11 states (Arkansas, Idaho, Indiana, Kansas, Louisiana, Nebraska, Nevada, North Carolina, South

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[21] See, for example, https://apnews.com/general-news-62cbb8bf5fd54bcf82aaa0c33e813c20 (last accessed March 5, 2024).
[22] See, for example, https://www.wkyt.com/2023/02/02/wkyt-investigates-justice-delivered-delayed-or-denied/ (last accessed March 5, 2024).
[23] http://www.reuters.com/article/2015/10/06/us-usa-execution-montana-idUSKCN0S02ZK20151006 (last accessed March 5, 2024).
[24] https://apnews.com/general-news-94be9c424e4843338d053ecdc3d59976 (last accessed March 5, 2024).
[25] https://apnews.com/article/legislature-ohio-coronavirus-pandemic-mike-dewine-executions-f7f1542613ae6922444d77341d4d3b40 (last accessed March 5, 2024).
[26] https://governor.ohio.gov/media/news-and-media/governor-dewine-issues-reprieves-04142023 (last accessed March 5, 2024).
[27] See https://www.nytimes.com/2011/11/23/us/oregon-executions-to-be-blocked-by-gov-kitzhaber.html (last accessed March 5, 2024).
[28] https://legiscan.com/OR/text/SB1013/id/2021649 (last accessed March 5, 2024).
[29] https://edition.cnn.com/2022/12/13/us/oregon-death-penalty-governor-commutations/index.html (last accessed March 5, 2024).
[30] https://www.cor.pa.gov/About%20Us/Initiatives/Pages/Death%20Penalty.aspx (last accessed March 5, 2024).
[31] https://www.americanbar.org/groups/committees/death_penalty_representation/project_press/2015/summer/pennsylvania-governor-declares-moratorium-on-death-penalty/ (last accessed March 5, 2024).
[32] https://www.tn.gov/correction/statistics/executions/tennessee-executions.html (last accessed March 5, 2024).
[33] https://apnews.com/article/politics-executions-tennessee-e4c90328bb6317c11bd98bf9dcdeb68a (last accessed March 5, 2024).

Carolina, Utah, and Wyoming) have not executed anyone for at least 5 years, and 9 states (all those listed except Arkansas and Nebraska) have not executed anyone for at least 10 years.[34]

As such, there are only 8 states (plus the Federal Government) that have carried out any executions in the last 5 years, with a substantial supermajority formally abolishing, imposing a moratorium, or simply not (regularly, or at all) executing anyone.

(iii) The Number of Death Sentences Imposed is Very Low

The Death Penalty Information Center reports that in 2023, courts in the United States imposed 21 death sentences, a figure that is consistent with the three preceding years (21 in 2022, 18 in 2021, and 18 in 2020).[35] The number of death sentences has dropped substantially from (for example) 2011 and 2012 when courts imposed 78 death sentences per year, and the highs of the mid-1990s when courts sentenced over 300 people to death each year.[36]

(iv) The Number of Executions is Similarly Very Low

The number of executions carried out in the United States has remained low. In 2023, authorities carried out 24 executions, which was slightly more than previous years (lower figures in the preceding 3 years were likely attributable to the pandemic).[37] Not since 2014 have authorities carried out more than 25 executions in any one year, and there have not been more than 50 executions per year since 2009.[38] The data show a consistent and persistent downward trend.

(v) Very Few Counties are Using the Death Penalty[39]

Along with the declining number of states actually executing individuals, the number of counties within those states that hand down death sentences that result in executions is becoming vanishingly small. Ten states have been responsible for the 78 non-Federal executions in the last 5-year period (to March 1, 2024). Within those 10 states, only 48 of 996 total counties have handed down death sentences that resulted in those executions. In other words, only 4.8 percent of the counties in that handful of states have been responsible for an execution in the last 5 years. All executions in the last 2 years (to March 1, 2024) have arisen out of convictions in a total of 29 counties in 7 states, out of a total of 676 counties in those states, or just 4.3 percent of counties in those states.

Indeed, looking at the last 10 years of data (since March 1, 2014), 12.4 percent of all non-Federal executions have come from just two counties (Dallas and Harris Counties, Texas), and 23.8 percent of all executions have come from just five counties (Bexar, Dallas, Harris, and

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[34] https://deathpenaltyinfo.org/executions/executions-overview/states-with-no-recent-executions (last accessed March 5, 2024).

[35] See https://deathpenaltyinfo.org/facts-and-research/sentencing-data/death-sentences-by-year/2023-death-sentences-by-name-race-and-county and associated pages for the previous years (last accessed March 5, 2024).

[36] https://deathpenaltyinfo.org/facts-and-research/sentencing-data/death-sentences-in-the-united-states-from-1977-by-state-and-by-year (last accessed March 5, 2024).

[37] https://deathpenaltyinfo.org/executions/executions-overview/number-of-executions-by-state-and-region-since-1976 (last accessed March 5, 2024).

[38] Ibid.

[39] All data in this section have been sourced from the Death Penalty Information Center's Execution Database, available here: https://deathpenaltyinfo.org/database/executions (last accessed March 5, 2024).

Tarrant Counties in Texas, and St Louis County, Missouri), and 104 counties only had one execution.

(vi) Summary

On all of these metrics, then, in recent years the number of death sentences and executions in the United States has fallen significantly and persistently.

## 4. Popularity of the Death Penalty is Decreasing Over Time

(i) Cautionary Words

Before explaining the results of the recent polls showing declining public support for the death penalty, we offer a few words of caution.

Carolyn Hoyle, Professor of Criminology at the University of Oxford, recently explained that certain polls and surveys—particularly surveys posing "*simple binary question[s]*"—can have a bias *toward* the death penalty, thereby overstating support.[40] As Professor Hoyle noted by reference to work conducted in Kenya, Zimbabwe, and Indonesia, as well as Taiwan:

> The overriding message from these disparate jurisdictions is that retentionists' insistence that capital punishment enjoys widespread support are often overstated, and that both policy-making elites and the wider public are, when confronted with the realities and weaknesses of the criminal process, deeply uneasy about the idea that the state should be empowered to end a human life. Moreover, such research also shows that even in retentionist states, there is generally little engagement with the issue, and even less knowledge of the punishment and its administration.[41]

Professor Hoyle adds that support for the death penalty in public opinion surveys tends to decrease when researchers provide participants with "the considerable body of empirical research evidence" challenging the proposition that the death penalty has a deterrent effect, and when they "[p]rovid[e] survey respondents with scenarios that supply context about an offender's mitigating circumstances."[42]

Professor Hoyle also observes that support for the death penalty tends to decrease over time after its abolition:

> When the death penalty is abolished, more and more citizens come to regard it as a punishment of the past. In the UK, surveys have shown that continued support for capital punishment fell from 74% in 1986 to 65% in 1996, then to 50% in 2007. It

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[40] See Hoyle C., "Crude Opinion Polls on the Death Penalty Distort Public Debate", August 28, 2023 available https://blogs.law.ox.ac.uk/death-penalty-research-unit-blog/blog-post/2023/08/crude-opinion-polls-death-penalty-distort-public (last accessed March 5, 2024).
[41] Ibid.
[42] Ibid.

finally dropped below 50% in 2014. Moreover, support for the death penalty is at its lowest in younger age groups.[43]

Apparent support for the death penalty in certain polls may therefore overstate public opinion, and typical polls are a very poor barometer of likely public sentiment after abolition. Hence, trends in support for the death penalty may well be better evidence than mere percentages at a snapshot in time.

(ii) Public Opinion in the United States

Data trends show decreasing support for the death penalty. After support for the death penalty peaked at 80 percent in 1994, support has steadily declined to a bare majority of 53 percent in 2023.[44] Support is even lower when individuals are asked whether life imprisonment without parole or the death penalty is a "better" sentence for the crime of murder, with only 36 percent of respondents opting for the death penalty, compared to 60 percent for life without parole.[45]

The public also has greater and greater distrust of the whole apparatus of the death penalty system. In a 2023 Gallup Poll, a record high of 50 percent of respondents thought that the death penalty was applied unfairly in the United States, with only 47 percent saying it was applied fairly.[46] In a 2021 Pew Research Center study, 78% of respondents said that there was "some risk" of innocent people being put to death.[47] The not-infrequent exonerations of people on death row—some of whom have spent upwards of 4 decades on death row before being released—may suggest that there this fear is well founded, with one exoneration already in 2024, 4 in 2023, and 2 in 2022.[48]

(iii) States with the Death Penalty

Strong state-level polling data over time is not always available. Nonetheless, there is evidence that even in states that most actively employ the death penalty (either as a sentence, or in actual executions), support for the death penalty may be falling. For example, in a University of Texas/Texas Tribune Poll from 2021, there was a new low of 63% support for the death penalty, down from 78% in 2010, and 75% in 2015.[49]

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[43] Ibid.
[44] https://news.gallup.com/poll/513806/new-low-say-death-penalty-fairly-applied.aspx (last accessed March 5, 2024).
[45] https://news.gallup.com/poll/268514/americans-support-life-prison-death-penalty.aspx (last accessed March 5, 2024).
[46] https://news.gallup.com/poll/513806/new-low-say-death-penalty-fairly-applied.aspx (last accessed March 5, 2024).
[47] https://www.pewresearch.org/politics/2021/06/02/most-americans-favor-the-death-penalty-despite-concerns-about-its-administration/ (last accessed March 5, 2024).
[48] https://deathpenaltyinfo.org/database/innocence?sort=exonerationYear/desc (last accessed March 5, 2024).
[49] https://www.texastribune.org/2021/05/03/texas-voters-legislature-poll/ (last accessed March 5, 2024).

Support in Louisiana is decreasing, with 58 percent public support in 2018, dropping to 51 percent in 2022.[50] Similarly, 79 percent of survey respondents in Utah favored the death penalty in 2010, while support dropped to 51 percent in 2021.[51]

(iv) States without an Active Death Penalty

There are similar difficulties in accessing accurate public opinion data in states that have moratoria or that have abolished the death penalty.

In Ohio, which is currently under a moratorium, a Quinnipiac University poll in 2014 indicated that Ohioans favored the death penalty 68 percent to 26 percent.[52] Six years later, a Tarrance Group poll found that almost 60 percent were in favor of abolition.[53]

In California, which currently has a moratorium but also has the largest number of people on death row, a 2016 ballot initiative kept the death penalty on the statute books by a 53 percent to 47 percent margin. Give years later, however, a Berkley IGS Poll found that only 35 percent were now in favor of keeping the death penalty, with 21 percent remaining undecided and 44 percent in favor of abolition.[54]

In the state of Washington, it is notable that a court struck down the state's death penalty statute in 2018, but in 2023 lawmakers followed up with legislation to remove the statute from the books entirely, showing that judicial action can result in expanded public support for abolition.

Massachusetts does not have the death penalty but the state recently experienced a high-profile Federal capital trial. After the bombing of the Boston Marathon in 2013, resulting in three deaths and hundreds of injuries, the Federal Government pursued a capital prosecution under Federal terrorism laws. Even after the tragic and highly publicized bombing, support for the death penalty for the surviving perpetrator remained astonishingly low, with 58 percent of people in the Greater Boston area supporting life imprisonment over the death penalty.[55]

## 5. Judicial Decisions Striking Down the Death Penalty in the United States

Many of the states that have abolished the death penalty have done so legislatively. In other cases, courts have struck down a state's death penalty, and then either the state legislature has acted to confirm the abolition of the death penalty *de jure*, or the legislature has declined to enact a new death penalty statute to "cure" the infirmity found by the court, and the death penalty has therefore been abolished *de facto*.

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[50] https://www.lsu.edu/manship/news/2022/april/la-2022-survey-shows-polarization-over-abortion.php (last accessed March 5, 2024).
[51] https://www.deseret.com/utah/2021/10/27/22748819/new-poll-reveals-what-utahns-think-about-abolishing-utahs-death-penalty-utah-capital-punishment/ (last accessed March 5, 2024).
[52] https://poll.qu.edu/images/polling/oh/oh02192014_k3s79f.pdf (last accessed March 5, 2024).
[53] https://ohiocapitaljournal.com/2021/01/28/poll-big-majority-in-ohio-support-getting-rid-of-the-death-penalty/ (last accessed March 5, 2024).
[54] https://escholarship.org/uc/item/5qq8v6c1 (last accessed March 5, 2024).
[55] https://www.wbur.org/news/2015/04/16/tsarnaev-death-penalty-poll-wbur (last accessed March 5, 2024).

Where courts invalidate the death penalty, they often express multiple reasons for doing so. These reasons fall under two sets of arguments:

> First, the death penalty system is inadequate to guard against arbitrary deprivation of life. As such, the death penalty is cruel and constitutionally impermissible.
>
> Second, "death is different," and not merely in degree from any other punishment, but in kind. Courts focus on the irreversibility of the death penalty, the potential (and indeed actual examples of) miscarriages of justice and exonerations, and the fact that death also extinguishes all other rights.

These main arguments have significant theoretical overlaps, but examining them in turn can facilitate understanding of how courts have approached abolition of the death penalty.

(i) Arbitrary Executions are Cruel and No Procedural Safeguards are Sufficient to Cure the Death Penalty's Arbitrariness

This jurisprudence may be traced back to the U.S. Supreme Court's most significant judgment on the subject of the death penalty, the 1972 case *Furman* v. *Georgia*.[56] Each justice wrote a separate opinion, but Justice Stewart's opinion is perhaps the most famous for his observation that:

> These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.[57]

As Justice Marshall noted in *Furman*, it was "evident that the burden of capital punishment falls upon the poor, the ignorant, and the underprivileged members of society."[58]

*Furman* struck down all the various capital punishment statutes in the country, and four years later the Supreme Court authorized death sentences again but within a framework that attempted to correct the perceived shortcomings. Yet that system contained and continues to contain inherent contradictions.

The U.S. Supreme Court subsequently recognized that mandatory death sentence schemes were unconstitutional because they did not permit courts to take into account mitigating factors.[59] On the other hand, *Furman* had struck down fully discretionary systems because they did not follow any intelligible standards for distinguishing between cases or defendants.

As such, the new regimes that the U.S. Supreme Court authorized in 1976 in *Gregg* v. *Georgia*[60] had to "channel" discretion. These systems purported to establish "objective" factors that would authorize imposition of a death sentence.

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[56] 408 U.S. 238 (1972).
[57] *Id.* at 309-10 (citations omitted).
[58] *Id.* at 365-66.
[59] *Woodson* v. *North Carolina*, 428 U.S. 280 (1976).
[60] 428 U.S. 153 (1976).

The U.S. Supreme Court soon recognized, however, that systems that merely specified aggravating circumstances were inadequate. In *Lockett* v. *Ohio*,[61] the Court recognized that the intricacies of human nature and experience required legal systems to take into account any mitigating factors relevant to the offender or the offense. To disregard evidence in mitigation would deny the uniqueness of each individual.[62]

These requirements, however, inevitably introduced an element of unchanneled discretion. As such, they opened the door for arbitrary deprivation of life that *Furman* had invalidated several years prior.

Both conservative and liberal jurists have recognized this inherent contradiction,[63] and they have been driven either to reject individualized sentencing taking into account all mitigating factors—a practice that others might view as the hallmark of fair sentencing and due process—or to determine that it is impossible to administer the death penalty while upholding foundational principles of law and justice.

Notably, in *District Attorney for the Suffolk District* v. *Watson*,[64] the highest court in Massachusetts determined that no system could ever be developed that could permissibly channel a court's discretion in a manner that could ensure a non-arbitrary application of the death penalty.

The court in *Watson* opined that the state's statutory definitions and line-drawing between capital-eligible murder and second-degree murder were so difficult to understand that they gave rise to an impermissible opportunity for discretion.

The Massachusetts court added that it was not just the court's or the jury's discretion that was relevant, but also the discretion of every actor along the way, including the police, prosecutors, judges, and defense counsel, whose discretion remained (and would always remain) untrammeled. This insidious arbitrariness would be fatal to any death penalty system.

(ii) "Death Is Different," Irreversibility, Exonerations, and the Effect on All Other Rights

In *Furman*, Justice Stewart wrote:

> The penalty of death differs from all other forms of criminal punishment, not in degree, but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.[65]

Justice Stewart's observation has greatly influenced the post-*Furman* jurisprudence on the death penalty, noting that the death penalty raises questions that simply do not arise for other criminal penalties.

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[61] 438 U.S. 586 (1978).
[62] *See Callins* v. *Collins*, 510 U.S. 1141, 1149 (1994).
[63] See, for example, Justice Scalia's opinion concurring in part and concurring in judgment in *Walton* v. *Arizona*, 497 U.S. 639, 656 (1990), and *Callins*.
[64] 381 Mass. 648 (1980).
[65] 408 U.S. 238, 306 (1972).

Perhaps the most significant judicial opinion building on this argument was a decision of the highest court of Massachusetts, in *District Attorney for the Suffolk District v. Watson.*[66]

Chief Justice Hennessey, writing the leading judgment of the Massachusetts Supreme Judicial Court, articulated several reasons to invalidate the state's death penalty law on the basis that it violated the state constitution's prohibition against "cruel or unusual punishment." The court endorsed the above-described concerns about arbitrariness and added that the state had not used the death penalty for decades. The court further found that:

- The death penalty "may cruelly frustrate justice," noting that other defendants may benefit from later legal or evidentiary changes, but the court "cannot, of course, raise the dead."[67]

- The "cruelty of the death penalty similarly inheres in its unparalleled effect on all the rights of the person condemned," noting that the "right to live . . . is the natural right of every [person]" encompassing, as it does, "the right to have rights."[68] The court observed that, unlike any other punishment, the death penalty strips a person of all other rights.

The court also observed that the "death penalty is unacceptable under contemporary standards of decency in its unique and inherent capacity to inflict pain. The mental agony is, simply and beyond question, a horror."[69]

In recognizing that "death is different," courts have recognized not only the right to life and the right not to be arbitrarily deprived of life, but also the fact that the death penalty extinguishes all other rights, including the right not to be punished without having committed an offence, the right to appeal and have a sentence corrected, and all other rights that natural people have.

Courts have acted with humility in acknowledging their own fallibility. No human justice system is perfect, and no court makes determinations based on incontrovertible facts. In appreciating this reality, the Massachusetts court, and other courts, have recognized that the risk of wrongful conviction—even if a court has found guilt beyond a reasonable doubt—is too high when life is on the line.

Justice Blackmun in *Callins* v. *Collins* explained:

> It is virtually self-evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies. The basic question—does the system accurately and consistently determine which defendants "deserve" to die?—cannot be answered in the affirmative . . . The problem is that the inevitability of factual, legal, and moral error gives us a system that we know must wrongly kill some defendants, a system that fails to deliver the fair, consistent, and reliable sentences of death required by the Constitution.[70]

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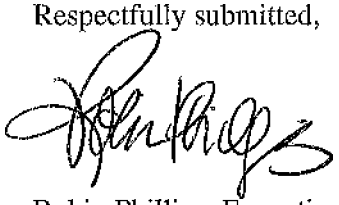
[66] 381 Mass. 648 (1980).
[67] *Id.* at 662-63.
[68] *Id.* at 663-64 (citations omitted and tidied up).
[69] *Id.* at 664.
[70] 510 U.S. 1141, 1145-46 (1994) (footnotes omitted).

## 6. Conclusion

The number of jurisdictions in the United States that permit the death penalty is consistently declining, alongside public support for the death penalty. The death penalty will soon be a relic of an earlier time. The logic and tide of jurisprudence inexorably lead to the conclusion that the death penalty is impermissible: it is cruel, irreversible, and inherently results in the arbitrary deprivation of life.

Respectfully submitted,



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