
1. Introduction: international perspectives on the death penalty

Richard C. Dieter

For most of human history, the death penalty has been the norm, rather than the exception, as a societal response to the most serious crimes. It is only in recent times that capital punishment has found itself on the defensive—criticized and virtually abandoned by the majority of countries in the world.

Despite its long and pervasive presence, capital punishment is now being rejected in law and in practice at an accelerated pace. The growing number of abolitionist countries and the international pressure exerted on retentionist countries point to a possible worldwide elimination of this practice, similar to the ending of the entrenched institutions of slavery and apartheid.

However, because the death penalty is so closely entwined with the political philosophies by which countries are governed, its complete disappearance in the near future seems unlikely. In some regions of the world it is actually expanding. Measuring the death penalty by the number of people potentially impacted by its use paints a different picture from one that counts only the number of countries with death penalty laws. Two-thirds of the world's population resides in countries that retain the punishment, and many of those countries are rapidly growing in size.

This volume of in-depth essays on the death penalty examines many of the common themes from disparate parts of the world that have led to the recent rejection of capital punishment by many countries. This introductory chapter will briefly examine the status of the death penalty around the world and highlight the competing pressures that may either ensure the continued decline of the death penalty or allow its continuation for decades to come.

Other chapters will explore the sources of death penalty law, including the offenses meriting execution and the classes of offenders who may be spared from such punishment; the legal safeguards employed in various places to secure and confirm a death sentence; the modern problems of the death penalty that have come under closer review, including the methods of execution, conditions on death row, and the issues of race and innocence; and finally the international institutions that have taken up the mantle of challenging capital punishment, both in individual cases and systemically. The book closes with an assessment of the likely future of the death penalty, based on the myriad of forces pushing it along different paths.

ROOTS OF CAPITAL PUNISHMENT

When societies first formed to better protect the shared interests of individuals, the death penalty was often deemed necessary to ward off enemies and to punish those who threatened the common good. The roots of capital punishment run deep in early civilizations. The earliest written laws, such as the Code of King Hammurabi of Babylon—dating from the eighteenth century BC—the Hittite Code (fourteenth century BC), and the Draconian Code of Athens

(seventh century BC) all make reference to the death penalty.¹ The Code of Hammurabi, for example, allowed capital punishment for many crimes, including stealing: ‘If any one is committing a robbery and is caught, then he shall be put to death.’² In early societies, there were no penitentiaries to house offenders for long periods of time, so punishments were often physical and inflicted swiftly, including the punishment of death.

As empires and colonizers spread around the world, they typically brought the death penalty to new lands. The Roman Empire incorporated its system of laws, including the death penalty, throughout its conquests and in neighboring provinces.³ Later, settlers from Europe brought the death penalty to the Americas. Executions in what was to become the United States were recorded as early as 1608 in Jamestown, Virginia.⁴ Indigenous people also employed capital punishment, although they were often the victims of this practice, as colonizers subjugated native tribes.⁵

US AND EUROPEAN INFLUENCE

Not all new nations, however, automatically adopted the death penalty. It was often the subject of considerable debate. Many new settlers in America were trying to escape the tyrannical rule of English kings. Capital punishment was rampant in England, where the death penalty allowed for scores of offenses in the ‘bloody code.’⁶ There was considerable debate when the US Constitution was formulated about whether to allow the death penalty. Historian John Bessler traces the questioning around the death penalty among some US founders to the European writer, Cesare Beccaria:

Although early US laws authorized executions, the founders greatly admired a now little-known Italian writer, Cesare Beccaria, who fervently opposed capital punishment. They also were fascinated by the penitentiary system’s potential to eliminate cruel punishments.⁷

Thomas Jefferson was among those who raised doubts about the death penalty, stating:

Beccaria and other writers on crimes and punishments had satisfied the reasonable world of the unrightfulness and inefficacy of the punishment of crimes by death.⁸

¹ M Reggio, ‘History of the Death Penalty’ in L Randa (ed), *Society’s Final Solution: A History and Discussion of the Death Penalty* (University Press of America 1997) 1.

² M Roth, *Crime and Punishment: A History of the Criminal Justice System* (Cengage Learning, Inc 2010) 19.

³ See Reggio (n 1) 2.

⁴ See ‘The Espy File’ (*Death Penalty Information Center*) <http://www.deathpenaltyinfo.org/executions-us-1608-2002-espys-file?scid=8&did=269> accessed 11 June 2019 (‘Espy File’).

⁵ See, for example, David Baker, ‘American Indian Executions in Historical Context’ (2007) 20(4) *Crim Justice Studies* 315–373.

⁶ John Bessler, *The Birth of American Law: An Italian Philosopher and the American Revolution* (Carolina Academic Press 2014) 6.

⁷ See J Bessler, ‘Actually, the Founders Rejected the Death Penalty’ *National Law Journal* (27 October 2014) (op-ed).

⁸ *ibid* (quoting Jefferson’s autobiography).

4 Comparative capital punishment

James Madison welcomed the debate in the states in that it might lead to the death penalty's abolition. Prominent leaders such as Benjamin Rush and Benjamin Franklin also spoke eloquently against the use of the death penalty.

Beccaria wrote in the eighteenth century and was very influential in both Europe and America. He ardently opposed capital punishment in principle:

What right, I ask, have men to cut the throats of their fellow creatures? Certainly not that on which the sovereignty and laws are founded. The laws, as I have said before, are only the sum of the smallest portions of the private liberty of each individual, and represent the general will, which is the aggregate of that of each individual. Did anyone ever give to others the right of taking away his life? Is it possible that, in the smallest portions of liberty of each, sacrificed to the good of the public, can be contained the greatest of all good, life? If it were so, how shall it be reconciled to the maxim which tells us, that a man has no right to kill himself, which he certainly must have, if he could give it away to another?⁹

Despite the questions raised about the death penalty among the Founders in the US, it was indirectly incorporated into the Constitution through the Fifth Amendment, which required that no person be deprived of life without the due process of law.¹⁰ Also, because the death penalty was commonly practiced in the colonies at the time of the writing of the Constitution, it was assumed to be outside the prohibition of 'cruel unusual punishments' in the Eighth Amendment.¹¹ The Supreme Court, however, never formally upheld the constitutionality of the punishment until 1976 in *Gregg v Georgia*.¹²

States were basically free to follow their own course on the use of the death penalty, and its use varied greatly among them. Between 1608 and the start of the modern era of the death penalty in the US in 1976, the three leading execution states (Virginia, New York, and Pennsylvania) carried out over 1000 executions each. Michigan, in contrast, carried out only 13 executions in the same 370-year span.¹³ It became the first state (and one of the first governments anywhere) to permanently abolish the death penalty in 1847, though the punishment was still allowed for treason.¹⁴ Michigan now bars the death penalty in its state constitution. Wisconsin carried out only one execution in its jurisdictional history. It abolished the death penalty permanently and for all crimes in 1853.¹⁵

It is interesting to note that all three of the leading US execution states in the country's earlier years now carry out hardly any executions. New York has not had an execution since 1963, and eventually ended the death penalty in 2007. Pennsylvania retains the death penalty, though it has had only three executions since 1976 and currently has a moratorium on all exe-

⁹ Cesar Beccaria, *On Crimes and Punishments* (Philip Nicklin (ed), 2nd edn, Philadelphia 1819) (quoted in Alberto Cadoppi, 'Cesare Beccaria, John Bessler and the Birth of Modern Criminal Law' (2015) 3(2) University of Baltimore Journal of International Law Art 2).

¹⁰ US Constitution: amendment V; see also amendment XIV.

¹¹ US Constitution: amendment VIII.

¹² *Gregg v Georgia* 428 US 153, 187 (1976): 'We hold that the death penalty is not a form of punishment that may never be imposed, regardless of the circumstances of the offense, regardless of the character of the offender, and regardless of the procedure followed in reaching the decision to impose it.'

¹³ See Espy File (n 4) (executions by state).

¹⁴ Roger Hood and Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective* (5th edn, Oxford 2015) 13.

¹⁵ *ibid*; see also Espy File (n 4) (number of executions).

cutions. Virginia has had 112 executions since 1976, but only four in the past five years and almost no new death sentences.¹⁶

Internationally, there were signs of discontent with the death penalty even earlier than in the US, though definitive legislative action often took more time. The Grand Duke of Tuscany (later part of Italy), abolished the death penalty in 1786, although it was later reinstated. The microstate of San Marino (located in northern Italy) has had no executions for almost 550 years.¹⁷ It formally abolished the death penalty in 1865. Venezuela last carried out an execution in 1830 and abolished capital punishment for all crimes in 1863. Cape Verde, off the northwest coast of Africa, has had no executions since 1835, and finally abolished the death penalty for all crimes in 1981.¹⁸

In more recent times, West Germany and the new state of Israel rejected the death penalty for ordinary crimes in the early years of their new governments. The Supreme Court of South Africa found the death penalty to be unconstitutional in its first decision after the fall of apartheid rule in 1995.¹⁹

THE ACCELERATING TREND AWAY FROM THE DEATH PENALTY

These early instances of abolition, however, did not become a groundswell until recent times. Most countries employed the death penalty well into the twentieth century. In 1965, a census prepared for the United Nations indicated there were only 25 abolitionist countries.²⁰ However, today many research organizations and scholars concur that the death penalty is in sharp decline around the world.

Roger Hood and Carolyn Hoyle (one of the authors in this compendium) have commented on the ‘striking increase’ in the number of countries abandoning the death penalty in the fifth edition of their comprehensive review of the death penalty worldwide: ‘Over the 11 years from 1989 to 1999 inclusive, 41 countries became abolitionist...an average of three a year.’²¹ From 2000 to 2014, another 26 countries were added to the list, at least for ordinary crimes.

Amnesty International, while noting an increase in worldwide executions (excluding China) in 2015, nevertheless has underscored the overall trend away from the death penalty:

When Amnesty International began campaigning for abolition in 1977, only 16 countries had fully abolished the death penalty. Today the majority of the world’s countries are fully abolitionist, and dozens more have not implemented death sentences for more than a decade, or have given clear indications that they are moving towards full abolition.²²

¹⁶ See ‘Executions by State’ (*Death Penalty Information Center*) <http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976> accessed 11 June 2019.

¹⁷ See Hood and Hoyle (n 14) app 1, table A1.2.

¹⁸ *ibid.*

¹⁹ *Makwanyane and Mchunu v The State* 1995 (16) HRLJ 154 (CC).

²⁰ Hood and Hoyle (n 14) 14.

²¹ *ibid.* 15.

²² Amnesty International, ‘Death Sentences and Executions 2015’ <https://www.amnesty.org/en/latest/research/2016/04/death-sentences-executions-2015/> accessed 11 June 2019 (‘Amnesty 2015’). Amnesty’s report on 2016 indicated a decrease in executions, again excluding the number in China. Amnesty International, ‘Death Sentences and Executions 2016’ (11 April 2017) <https://www>

6 Comparative capital punishment

The World Coalition Against the Death Penalty has reported on the progress within the United Nations on a recurring resolution supporting a moratorium on all executions. Only 40 countries opposed the resolution in the most recent vote:

The UN General Assembly voted overwhelmingly for a sixth resolution calling for a universal moratorium on executions. On 19 December 2016, with 117 States voting in favour of the resolution, the UN member states reasserted their support for a universal moratorium on the use of the death penalty.²³

Sandra Babcock (also one of the authors in this compendium) and her colleagues at Cornell University Law School have assembled an extensive interactive database of information about the use of the death penalty around the world, called 'Death Penalty Worldwide'. Their project came to a similar conclusion about recent trends in its 2016 report:

By the end of 2015, 104 countries had legally abolished the death penalty for all crimes—more than half of the world's roughly 200 states and territories, no matter how broadly defined. Sixty-one of these countries abolished in the 1990s and 2000s, giving birth to what we now consider a global movement toward the universal abolition of capital punishment. In 2015 alone, four countries promulgated laws that fully abolished the death penalty (Suriname, Fiji, Madagascar, Republic of Congo), and a fifth (Mongolia) repealed the death penalty to fulfill an international treaty commitment to abolish. Even in countries that retain the death penalty, the use of capital punishment is rare: forty-nine death penalty states have not carried out any executions in at least ten years. The use of capital punishment is increasingly confined to a small number of states that carry out large numbers of executions. Of the twenty-five countries where Amnesty International recorded executions in 2015, 89 per cent of all executions outside of China were carried out in three countries: Iran, Pakistan and Saudi Arabia.²⁴

In a 2017 statement, Human Rights Watch, which monitors use of the death penalty around the world, confirmed the consensus regarding this trend away from the death penalty:

A majority of countries in the world have abolished the practice. In 2012, following similar resolutions in 2007, 2008, and 2010, the United Nations General Assembly called on countries to establish a moratorium on the use of the death penalty, progressively restrict the practice, and reduce the offenses for which it might be imposed, all with the view toward its eventual abolition. Former UN Secretary-General Ban Ki-moon also called on countries to abolish the death penalty.²⁵

Another measure of the decline in the use of the death penalty is the growing number of countries that have signed international treaties that either ban or limit capital punishment. The Second Optional Protocol to the International Convention on Civil and Political Rights

.amnestyusa.org/files/death_penalty_2016_report_embargoed.pdf accessed 11 June 2019 ('Amnesty 2016'). However, the number in 2016 was higher than the average for the previous decade. *ibid* 4.

²³ Elise Guillot and Aurélie Plaçais, 'Moratorium' (20 December 2016) <http://www.worldcoalition.org/The-UN-General-Assembly-voted-overwhelmingly-for-a-6th-resolution-calling-for-a-universal-moratorium-on-executions.html> accessed 11 June 2019.

²⁴ Cornell Center on the Death Penalty Worldwide, 'Pathways to Abolition of the Death Penalty' (June 2016) 2 <http://www.deathpenaltyworldwide.org/pdf/pathways-english.pdf> accessed 19 June 2019.

²⁵ 'Kuwait: First Executions in 4 Years' (*Human Rights Watch News*, 26 January 2017) <https://www.hrw.org/news/2017/01/26/kuwait-first-executions-4-years> accessed 11 June 2019 ('Human Rights Watch opposes capital punishment in all countries and under all circumstances. Capital punishment is unique in its cruelty and finality, and it is inevitably and universally plagued with arbitrariness, prejudice, and error.').

prohibits executions outside times of war²⁶ and has been ratified by 81 countries. As of 2014, 46 countries had ratified a similar protocol to the European Convention on Human Rights (ECHR) that bars the death penalty, at least in peacetime.²⁷

EXECUTIONS WORLDWIDE

The number of executions serves as another barometer of the death penalty's use. In countries that retain the death penalty, the numbers have generally declined. The US is a prime example of this trend: from 1999 to 2016 there was an 80 percent drop in the annual number of executions.²⁸

With respect to other countries, Hood and Hoyle reported that: 'With very few exceptions, such as Iran and Saudi Arabia...the number of executions annually recorded appears to be falling almost everywhere.'²⁹ They noted that Singapore, which had the highest *per capita* rate of executions in the 1990s and had 74 executions in 1994, had only five in 2009 and none in 2012 or 2013. Executions in Malaysia, Thailand, and India have also declined. India, the world's second most populous country, had no executions between 2004 and November 2012.³⁰

Of course, executions can flare up at any time in countries that retain capital punishment. Amnesty International, Human Rights Watch, and Reprieve have issued recent alerts about a spike in executions in various regions. Amnesty reported that executions in countries other than China increased 54 percent in 2015 compared to the year before, with most of the increase centered in just a few countries:

Of all executions recorded in 2015, 89% were carried out in just three countries: Iran, Pakistan and Saudi Arabia. The number of executions recorded in Iran and Saudi Arabia increased by 31% and 76% respectively, and executions in Pakistan were the highest Amnesty International has ever recorded in that country.³¹

Amnesty also noted an increase in the number of countries carrying out at least one execution:

Amnesty International recorded executions in 25 countries [in 2015], three more than in 2014. Chad and Oman resumed executions after years without executing anyone. Bangladesh, India, Indonesia

²⁶ International Covenant on Civil and Political Rights, 19 December 1966, 999 UNTS 171 entered into force 3 January 1976 ('ICCPR') (allowing reservations to be taken by countries regarding the death penalty in time of war).

²⁷ See Hood and Hoyle (n 14) 28 (citing Protocol 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 221).

²⁸ See 'Executions by Year' (*Death Penalty Information Center*) <https://deathpenaltyinfo.org/executions-year> accessed 11 June 2019.

²⁹ See Hood and Hoyle (n 14) 19.

³⁰ *ibid.*

³¹ See Amnesty 2015 (n 22) 3–4. The number of executions in Iran in 2016 was at least 530, according to Iran Human Rights, but that was a decrease compared to the annual numbers for the past five years. See 'Iran: Annual Report on the Death Penalty 2016' (*Mohabat News*, 12 March 2017) <http://mohabatnews.com/en/?p=3390> accessed 11 June 2019.

8 Comparative capital punishment

and South Sudan executed people in 2015; no executions were reported in these countries in 2014, although each executed people in 2013.³²

In its report on the death penalty in 2016, Amnesty noted that the number of executions outside of China had declined and the number of countries carrying out executions also decreased.³³

Human Rights Watch reported that Bahrain and Jordan returned to carrying out executions after lengthy periods of having none.³⁴ Reprieve—a London-based organization opposed to the death penalty—noted Pakistan's increased use of capital punishment in 2016:

In Pakistan, the authorities continued to execute scores of prisoners from the country's 8,000-strong death row. A total of 419 prisoners have been hanged since a moratorium on the death penalty was lifted in December 2014.³⁵

These numbers are a stark reminder of the wide divergence of views and practice among nations about the use of the death penalty. Political changes or a rise in terrorism can often trigger a return to punitive rhetoric and harsher punishments.

COUNTING ABOLITION COUNTRIES

Tracking the use of the death penalty in over 200 countries around the world is a herculean task, especially since many countries are secretive about their practices or have no central accounting of criminal justice statistics. Amnesty International stands out among organizations taking on this challenge. Founded in 1961, Amnesty's initial focus as an organization had been the identifying and freeing of political prisoners, particularly in countries with repressive regimes, and opposing the death penalty for prisoners of conscience. However, in 1971 it announced that it intended to work towards the abolition of the death penalty in all countries and for all crimes.³⁶

Since 1979, it has published a regular report on the death penalty worldwide, examining trends in individual countries and regions. In particular, it established the widely used three-tier approach to categorize countries on their practice of the death penalty: Retentionist, Abolitionist in Practice, and Abolitionist in Law (which is subdivided into countries that have abolished the death penalty for all crimes and those that retain it just for extraordinary crimes like treason or in time of war).

The list of countries that have abolished the death penalty versus those that retain it in law and use it in practice is perhaps the best measure of death penalty use around the world. Executions and death sentences are much harder to compile on a worldwide basis. In particu-

³² See Amnesty 2015 (n 22) 6. The number of countries carrying out executions dropped to 23 in 2016.

³³ See Amnesty 2016 (n 22) 4.

³⁴ See Human Rights Watch (n 25).

³⁵ Reprieve, 'Global executions in 2016' (2017) <http://www.reprieve.org.uk/update/global-executions-2016/> accessed 11 June 2019.

³⁶ A Karn, *Amnesty International and the Death Penalty: Toward Global Abolition* (University of New Mexico Press 2010) 116.

lar, China reportedly carries out more executions than the rest of the world combined,³⁷ but no one (outside of China) knows how many there are each year. So, to say that executions worldwide have decreased or increased in a given year is misleading. Trends in China could make the exact opposite true, if known.³⁸

Amnesty's middle category, 'Abolitionist in Practice' (or abolitionist *de facto*), must also be used cautiously. A country generally falls into this category if it has had no executions in ten years and is believed to have a policy of not carrying out executions despite retaining the death penalty in law. However, there are many reasons short of a commitment to eventual abolition that could influence why a state has not carried out an execution. All of the states in the US had at least a ten-year break in carrying out executions related to the national moratorium that extended from the last execution in Colorado in 1967 to the first one in Utah in 1977, after the death penalty was allowed to resume by the Supreme Court. Despite this pause, 38 states returned to the use of the death penalty and almost all have actually carried out executions after the break. Ohio, for example, had no executions between 1963 and 1999, but has had 53 since then.³⁹ And the federal government carried out the execution of Timothy McVeigh in 2001 after a 38-year period of no executions (including many years when there was no valid federal capital punishment statute in place).

The same is true of other countries. Human Rights Watch recently noted:

In the regional trend to increasing use of the death penalty, in January, 2017, Bahrain ended a six-year *de facto* moratorium on the death penalty, executing three people. In December 2014, Jordan ended its eight-year moratorium on the death penalty, executing 11 people.⁴⁰

Hood and Hoyle, too, caution about the temporary nature of the *de facto* abolition category, noting that countries can quickly return to the Retentionist column, especially after a regime change:

In several cases the 'ten-year gap' has occurred not because governments have wanted to curb executions, but because they were thwarted by successful legal interventions, as in countries of the Commonwealth Caribbean. Since 1994, 11 countries that appeared to be abolitionist *de facto* resumed executions—although none on a regular basis—thereby returning to the retentionist camp (Bahamas, Bahrain, Burundi, Chad, Comoros, Gambia, Guinea, Guatemala, St. Kitts and Nevis, Trinidad and Tobago, and Qatar).⁴¹

DECLINE IN THE US

Probably no country has so much data available on the use of the death penalty as the United States. The availability of news articles and governmental statistics to anyone with a computer

³⁷ See Amnesty 2016 (n 22) 19.

³⁸ See, for example, 'Strike Less Hard' (*The Economist*, 3 August 2013) <http://www.economist.com/news/china/21582557-most-worlds-sharp-decline-executions-can-be-credited-china-strike-less-hard> accessed 11 June 2019 (reporting dramatic decline in executions in China).

³⁹ See generally 'Executions by State' (n 16) (as of 24 July 2017, with more executions scheduled in coming months).

⁴⁰ See Human Rights Watch (n 25).

⁴¹ Hood and Hoyle (n 14) 20.

means that there are many ways of analyzing and reporting on the use of capital punishment. Each state is a microcosm of a government electing to keep or end the death penalty. In addition, the national ten-year pause in the death penalty referenced above has created a new baseline in maintaining real-time information.

The trend away from the death penalty in the US has been robust. The Death Penalty Information Center (DPIC), based in Washington, D.C., and founded in 1991 to better inform the public about how the death penalty is being applied in practice, keeps statistics on many aspects of the death penalty. The Center cooperates with others studying this issue so that any errors can be quickly identified and remedied.

When the death penalty was allowed to return following a Supreme Court ruling in 1976 that upheld the constitutionality of capital punishment,⁴² states adopted the restrictions the Court endorsed, returned to regularly imposing death sentences, and soon began executions. By the late 1990s, the number of executions had reached nearly 100 per year and death sentences were being imposed at a rate of 300 per year. Surprisingly, that strong growth in the use of the death penalty took a dramatic turn beginning around the year 2000.

That downward trend has continued to this day. As DPIC noted in its annual report summarizing developments in the US death penalty in 2016:

Use of the death penalty fell to historic lows across the United States in 2016. States imposed the fewest death sentences in the modern era of capital punishment, since states began re-enacting death penalty statutes in 1973. New death sentences are predicted to be down 39% from 2015's 40-year low. Executions declined more than 25% to their lowest level in 25 years, and public opinion polls also measured support for capital punishment at a four-decade low.⁴³

The reasons for this dramatic turnaround have been thoroughly analyzed in the media and scholarly works.⁴⁴ However, the US has not been a world leader in abolition of the death penalty. Almost all of the US's major allies have not only abandoned the death penalty, but also pro-actively work for its abolition everywhere. In contrast, the US continues the death penalty in many of its states and on the federal level, often ranking among the top five execution countries in the world.⁴⁵ There were strong indications that the US was ready at last to join its allies in this regard, but the 2016 national elections, as discussed below, may have delayed that final step.

A CONTRASTING ANALYSIS OF WORLDWIDE TRENDS

If the international death penalty were only measured by the number of countries that are actively using it, it would appear that capital punishment is practiced by only a minority of

⁴² Gregg (n 12).

⁴³ See 'The Death Penalty in 2016: Year End Report' (*Death Penalty Information Center*, 2016) <http://deathpenaltyinfo.org/documents/2016YrEnd.pdf> accessed 11 June 2019.

⁴⁴ See, for example, Frank Baumgartner and others, *The Decline of the Death Penalty and the Discovery of Innocence* (Cambridge 2008); see also D McCord and T Roitberg Harmon, 'Lethal Rejection: An Empirical Analysis of the Astonishing Plunge in Death Sentences in the United States from their Post-*Furman* Peak' (forthcoming in *Albany Law Review*) (on file with the author).

⁴⁵ See, for example, Amnesty 2015 (n 22) 63.

Table 1.1 Top ten countries by population

Rank	Country	Population	% of World Population	Death Penalty?
1	China	1,384,000,000	18.40%	YES
2	India	1,317,870,000	17.50%	YES
3	United States	325,324,000	4.33%	YES
4	Indonesia	263,991,000	3.51%	YES
5	Brazil	207,670,000	2.76%	NO
6	Pakistan	197,663,000	2.63%	YES
7	Nigeria	190,886,000	2.54%	YES
8	Bangladesh	162,701,000	2.17%	YES
9	Russia	146,804,372	1.95%	NO
10	Japan	126,740,000	1.69%	YES

Source: https://en.wikipedia.org/wiki/List_of_countries_and_dependencies_by_population.

nations around the world. (See Figure 1.1). About 71 percent of the countries have abolished the death penalty in law or in practice. Even in the US, about 60 percent of the states have not carried out an execution in ten years and only a handful of states are carrying them out on a regular basis. (See Appendix below.)

However, another way to measure the death penalty is to count the people who are subject to being punished with death as compared to those who live in countries with no death penalty. That analysis reveals a very different picture: almost two-thirds of the world's population lives in countries that actively practice the death penalty.

It appears that countries with larger populations tend to retain the death penalty, although many small countries have it as well. (See Appendix for source of populations.) Eight of the ten countries with the largest populations in the world have an active death penalty, beginning with China, India, the United States, and Indonesia. Among the top ten countries by population, only Brazil and Russia are considered abolitionist in practice, with Brazil retaining the death penalty for exceptional crimes and Russia resisting the final step of abolition, despite a moratorium on executions.

Using recent population estimates, the countries listed by Amnesty International as actively using the death penalty (Retentionist) have a combined population of 4.9 billion, which is 65.5 percent of the world's population of approximately 7.5 billion. (See Appendix.) This is almost the reverse of the comparison obtained using the number of countries, rather than their populations. (See Figures 1.1 and 1.2 overleaf.)⁴⁶

It may be more difficult for a large country to reach consensus about abandoning a practice that has existed since the country's founding. There also appears to be a correlation between authoritarian rule and the death penalty. Countries like China, Pakistan, and those in the Middle East are led by strong rulers with punitive law-and-order practices. The US might appear to be an exception since it is not generally seen as authoritarian or dictatorial but has a large population. However, when it comes to crime and punishment, the US can be very punitive. In addition to the death penalty, the US has the largest *per capita* rate of imprison-

⁴⁶ In contrast, in the US, 54.6% of the country's population live in states that have *not* carried out executions within the past ten years and about 60% of the states have similarly not carried out executions in ten years. See Appendix below.

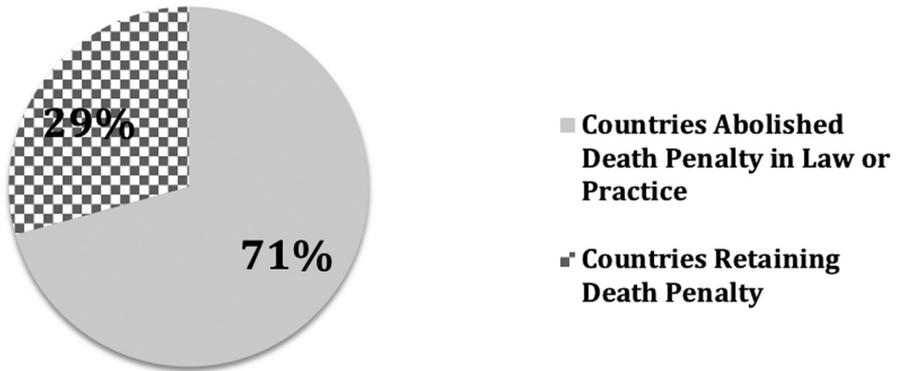


Figure 1.1 Over two-thirds of world's countries have abolished the death penalty in law or practice

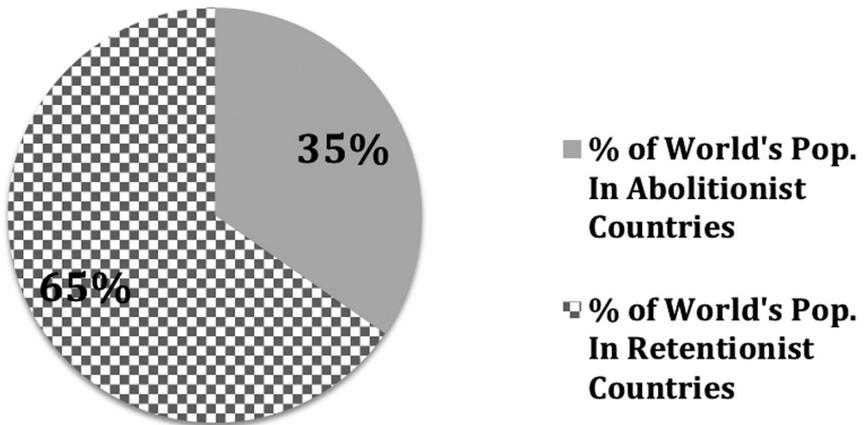


Figure 1.2 Almost two-thirds of world's population subject to death penalty

ment in the world.⁴⁷ Moreover, the states where executions are most often carried out, such as Texas, tend to pride themselves on a law-and-order approach to crime.

When examining populations, it is also instructive to look at the *per capita* execution rates in various countries. This figure is subject to the same uncertainty about the actual number of executions being carried out mentioned above. Hood and Hoyle offer a comparison among

⁴⁷ See 'World Prison Populations' (*BBC News*, 2009). <http://news.bbc.co.uk/2/shared/spl/hi/uk/06/prisons/html/nn2page1.stm> accessed 11 June 2019. The US has the highest per capita rate of incarceration, followed by Russia, Ukraine, and South Africa.

countries during 2009–13, based on the countries with at least 100 executions in that time: Iran was the leader in executions on a *per capita* basis, executing approximately 7.35 inmates per million population. Iraq had a rate of 2.99, Saudi Arabia 2.34, and China approximately 2.22 (China is estimated to have had 15 000 executions in that period). The US, which has often been ranked among the top five countries when it comes to total annual executions, was much lower on a *per capita* basis with 0.14, and executions have declined even more of late.⁴⁸

POLITICAL CORRELATIONS

In many countries, there appears to be a correlation between the death penalty and authoritarian leanings. The leading execution countries in 2016 were China, Iran, Iraq, Pakistan, Saudi Arabia, and Egypt,⁴⁹ all with governments exercising tight control. In the US, authoritarianism does not prevail, but having and using the death penalty has mapped strongly with being a ‘red’ or Republican-voting state rather than being a ‘blue’ or Democratic-voting state. In the most recent national elections, the Democratic party platform advocated abolishing the death penalty,⁵⁰ though the issue did not figure prominently in the national presidential campaigns. Of the states that have recently abolished the death penalty, all had Democratic governors at the time of abolition, with the exception of New Hampshire.⁵¹ All four of the states that have placed a formal hold on executions pending broader discussions on the death penalty have Democratic governors (Colorado, Oregon, Pennsylvania, and Washington). Nebraska would have been an exception to this overall pattern as its legislature voted to repeal the death penalty in 2015, overriding the Republican governor’s veto. However, that repeal was rescinded by the voters in 2016, so the state remains in the death penalty column.

In the democracies of Europe, the only country still using the death penalty is Belarus, which has been led by the authoritarian President, Alexander Lukashenko, since 1994. Another example of the political correlation occurred in South America, where Brazil restored the death penalty during its authoritarian period of 1968–85.⁵²

⁴⁸ See Hood and Hoyle (n 14) 173.

⁴⁹ See Amnesty 2016 (n 22) 5.

⁵⁰ See Rachel Chason, ‘In party platform, Democrats call for end to death penalty’ (*CNN*, 1 July 2016) <http://www.cnn.com/2016/07/01/politics/democrats-death-penalty/> accessed 11 June 2019.

⁵¹ See ‘State Information’ (*Death Penalty Information Center*) <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> accessed 11 June 2019. It should be noted that the Republican governor of Illinois, George Ryan, was the person who declared a moratorium on executions and initiated the process that led to the state’s abolition of the death penalty in 2011. Michigan has had many Republican governors since it became the first state to permanently abolish the death penalty in 1847. See also in the US, ‘Conservatives Concerned About the Death Penalty’, <http://conservativesconcerned.org/> accessed 11 June 2019.

⁵² T Brenemen, ‘Brazil’s Authoritarian Experience: 1964–1985; A Study Of A Conflict’ (1995) http://www.colorado.edu/conflict/full_text_search/AllCRCDDocs/95-1.htm accessed 11 June 2019 (working paper).

REINSTATEMENT EFFORTS

More stringent criminal justice practices have arisen recently in some countries that either had abolished the death penalty or were coming close. Russia, Turkey, and the Philippines all fall within the list of abolitionist countries, either in law or practice, but all three have recently moved closer to authoritarian rule.

The Philippines, a predominantly Catholic country, proudly abolished the death penalty for all crimes in 2006, and last carried out an execution in 2000. However, the Philippines elected an authoritarian-style president in 2016, after dissatisfaction with the corruption of prior regimes reached a peak. President Rodrigo Duterte has launched a fierce campaign against drug users and other perceived enemies and promised to bring back the death penalty. He has even threatened to execute criminals himself. His death penalty proposal has brought strong opposition from the Catholic hierarchy. Legislation has been introduced in the parliament and is given a strong chance of passing in the coming months.⁵³

Under President and former Prime Minister Tayyip Erdogan, Turkey had mostly continued on its course of moderation and actively sought membership in the European Union. This required the country to move towards abolition of the death penalty, which it accomplished in 2004. However, a coup attempt in 2016 has led to a dramatic turnaround in many areas of society. Thousands have been arrested, including journalists and dissidents, and the country's leadership has become more aligned with Russia than with Europe. Erdogan has called for a return to the death penalty, despite protests from the EU.⁵⁴

Under Vladimir Putin, Russia has also moved closer to an authoritarian style of rule. He has cracked down on dissident minorities, limited freedom of the press, and used Russia's military strength more aggressively in Ukraine and Syria.⁵⁵ After the fall of the Soviet Union, Russia expressed interest in joining the European Union. It imposed a moratorium on executions in 1996 that continues to this day (though executions have been carried out in Crimea, which was recently annexed by Russia). While there has been a more recent distancing of Russia from the European fold, Putin, himself, has said the death penalty moratorium should stay in place,⁵⁶ and the public appears equally divided about bringing back the death penalty.⁵⁷ Nevertheless, some Russian political leaders are pushing for a return,⁵⁸ and the country's lack of interest in the EU lessens the pressure Europe will be able to exert.

⁵³ See 'Duterte threatens up to 6 executions daily if death penalty is restored' (*ABS-CBN News*, 19 December 2016) <http://news.abs-cbn.com/news/12/19/16/duterte-threatens-up-to-6-executions-daily-if-death-penalty-is-restored> accessed 11 June 2019.

⁵⁴ 'Turkish President Resurrects Death Penalty Issue' (*Voice of America*, 21 February 2017) <http://www.voanews.com/a/turkey-death-penalty/3733798.html> accessed 11 June 2019.

⁵⁵ Sarah Rainsford, 'Protesting in Putin's Russia' (*BBC News*, 25 August 2016) <http://www.bbc.com/news/world-europe-37173820> accessed 11 June 2019.

⁵⁶ Leonid Bershidsky, 'Commentary: Is it fair to call Putin a killer?' (*Chicago Tribune*, 7 February 2017) <http://www.chicagotribune.com/news/opinion/commentary/ct-putin-kills-enemies-journalists-poison-20170207-story.html> accessed 11 June 2019.

⁵⁷ 'Russian opinions on death penalty split evenly, poll shows' (*RT*, 8 February 2017) <https://www.rt.com/politics/376669-russian-opinions-on-death-penalty/> accessed 11 June 2019.

⁵⁸ *ibid.* See also Amnesty 2015 (n 22) 45 (members of Parliament calling for a reintroduction of the death penalty).

None of these three countries has actually carried out an execution in many years, so they would still be included in the non-death penalty category (although extra-judicial killings may be supplanting capital punishment, especially against political enemies). If all three of those countries returned to using the death penalty, nearly 70 percent of the world's population would fall under death penalty rule. (See Appendix below.)

SHIFTS IN THE US?

In the US, the most recent presidential election ended with a more autocratic figure, Donald Trump, in the White House, along with Republican control over the House, Senate, and many state houses. Trump's flurry of executive orders has shown a strong law and order bent. So far, the death penalty has not been part of the sweeping changes he is putting into place. He is clearly a strong supporter of capital punishment and has called for its use against child rapists and even those involved in leaking government secrets.⁵⁹ Earlier in his career in 1989, Trump placed a full-page newspaper advertisement in many New York papers calling for a return to the death penalty following a shocking rape that occurred in Central Park.⁶⁰ Five black and Latino defendants had been arrested and later convicted, but were eventually cleared of all charges. New York did temporarily restore the death penalty in 1995.

Trump also signaled his death penalty support by inviting Philippine President Duterte to the White House and praising Turkey's President Tayyip Erdogan, both of whom have pushed for a return to capital punishment. The President in the US has jurisdiction over the federal death penalty, which is only a very small part of the overall practice of capital punishment. There have been no executions on the federal level since 2003, although 62 inmates remain on the federal death row, and new federal death sentences were imposed recently on Dzhokhar Tsarnaev for the Boston Marathon bombing and Dylann Roof for the attack on the Mother Emanuel worshippers in South Carolina. A pro-death penalty President and Attorney General could accelerate the number of executions and death sentences, especially since the federal law is very broad in terms of the number of crimes that could be considered capital.

A recent expansion of the federal death penalty has been introduced in Congress. It would allow the murder of a state or local police officer to establish eligibility for a federal death sentence.⁶¹ The only federal executions in the modern era of the death penalty occurred under President George W. Bush, the former governor of Texas.

Even outside of the presidential realm, there have been some cracks in the trend away from the death penalty in the US. In Nebraska, a referendum in 2016 restored the death penalty by a vote of over 60 percent after the legislature had voted to abolish it. In California, also

⁵⁹ Ben Geier, 'Donald Trump has a strong stance on capital punishment' (*Policy Mic*, 24 January 2017) <https://mic.com/articles/166436/donald-trump-has-a-strong-stance-on-capital-punishment#.6eQyn0AxU> accessed 11 June 2019.

⁶⁰ J Ross, 'Donald Trump's doubling down on the Central Park Five reflects a bigger problem' (*The Washington Post*, 8 October 2016) https://www.washingtonpost.com/news/the-fix/wp/2016/10/08/donald-trumps-doubling-down-on-the-central-park-five-reflects-a-bigger-problem/?utm_term=.105127d41e1b accessed 11 June 2019.

⁶¹ Sherri Lonon, 'Thin Blue Line Act Cleared For Full House Vote' (*Patch*, 27 April 2017), <https://patch.com/florida/brandon/thin-blue-line-act-cleared-house-vote> accessed 11 June 2019 (passed House, 18 May 2017).

in 2016, voters rejected an initiative to abolish the death penalty and narrowly approved one to speed up the appeals process. Also, Arkansas recently resumed executions after a lengthy moratorium, with four executions over a seven-day period in April 2017. They had threatened to execute eight inmates, but half received stays from various courts.⁶²

OTHER SHIFTS

Internationally, there have been similar signs countering the more predominant trend away from the death penalty. In addition to the ending of execution moratoria in Bahrain and Jordan mentioned above, Amnesty International recently reported on a surge in executions in war-torn Syria. They estimated that up to 13 000 executions, mostly of civilians, occurred in just one prison from 2011 to 2015.⁶³ Kuwait⁶⁴ and Nigeria⁶⁵ recently carried out multiple executions after having none in the past few years. The Maldives may be preparing a return to executions after a 60-year moratorium.⁶⁶

The decline in the use of the death penalty in the US, however, is almost completely state-driven, and has been steep and consistent. It may be immune to political changes on the national level. Death sentences dropped from 316 in 1996 to just 30 in 2016, a 90 percent decrease. Executions have had a similar drop, and the number of states actively using the death penalty is lower than it has been in decades.⁶⁷

Researchers have found that the death penalty in the US is not only reserved to just a few states, it is also the product of relatively few counties.⁶⁸ There are over 3000 counties in the US. These are small geographical entities that may encompass a large city or contain mostly rural areas with one town as the county seat. The importance of counties in the US is that they are the jurisdictional level at which the decision to seek the death penalty is usually made. A county typically has a locally elected district attorney, the chief prosecutor of the county. He or she makes the charging decisions regarding local crime. Counties may also be responsible for providing defendants with representation, even in a capital case.

A rural county with a small budget is less likely to seek the death penalty than those with large cities. True, they may have fewer crimes than counties that contain a large city, but that is not the whole story. They probably will have less money to spare on even a single death penalty case, which can cost \$1 million to prosecute. Their local attorneys may have never

⁶² ‘The Latest: Attorney: Reports of Execution “Horrifying”’ (*AP News*, 28 April 2017) <https://apnews.com/028b504d38b745e2889a5eebe04cc51a> accessed 18 June 2019.

⁶³ J Berlinger and L Said-Moorhouse, ‘13,000 people hanged in secret at Syrian prison, Amnesty says’ (*CNN*, 7 February 2017) <http://www.cnn.com/2017/02/07/middleeast/syria-executions-amnesty-international-report/> accessed 11 June 2019.

⁶⁴ See Human Rights Watch (n 25) (Kuwait).

⁶⁵ Abdur Rahman Alfa Shaban, ‘Nigerian judge wants death row executions carried out to ease prison congestion’ (*AfricaNews*, 2 February 2017) <http://www.africanews.com/2017/02/02/nigerian-judge-wants-death-row-executions-carried-out-to-ease-prison-congestion/> accessed 11 June 2019.

⁶⁶ Gabriella Jóźwiak, ‘Maldives leaves the Commonwealth’ (*Devex*, 21 December 2016) <https://www.devex.com/news/maldives-leaves-the-commonwealth-89337> accessed 11 June 2019.

⁶⁷ See ‘Year End Report 2016’ (n 43).

⁶⁸ See generally, R Dieter, ‘The 2% Death Penalty: How a Minority of Counties Produce Most Death Cases at Enormous Costs to All’ (Death Penalty Information Center, October 2013) <https://files.deathpenaltyinfo.org/legacy/documents/TwoPercentReport.pdf> accessed 18 June 2019.

tried a capital case. As a result, only 2 percent of the counties in the US have been responsible for the majority of all executions since 1976. Similarly, only 2 percent of counties were responsible for a majority of all the people on death row in 2013.⁶⁹

The places that were responsible for the most executions in the country were from places like Houston and Dallas (Texas), Oklahoma City, Phoenix (Arizona), and St. Louis (Missouri). Many counties in Texas have had no executions in the modern era and no one currently on death row.

As the outlier counties responsible for a disproportionate share of death penalty use were identified, researchers found that these same counties were responsible for egregious injustices in capital and other cases.⁷⁰ At least one district attorney was disbarred for abuse of power, and others have been cited for repeated instances of withholding critical information in capital cases. Some of these death penalty-prone prosecutors have recently been replaced with district attorneys who have promised to be more selective in seeking death sentences, if they seek them at all.⁷¹

The focus on counties, along with the rising costs of the death penalty and the uncertainty of obtaining a death sentence because of the hesitation among jurors nationwide to impose death, are likely to mean death sentences will remain low. However, with so many county-based decision-makers across the country, it is quite possible that new aggressive prosecutors could come to power and death sentences could rise in those counties. It is unlikely that death sentences will drop to zero, unless the number of states with the death penalty declines much more.

There is one alternative way the death penalty in the US could end quickly, short of just winding down to zero use.⁷² The US Supreme Court struck down the death penalty across the country in 1972 in *Furman v Georgia*.⁷³ It was a close 5:4 outcome, and its effect did not stand the test of time, as the death penalty was allowed to resume in 1976. The legal basis for *Furman*—that the death penalty was being arbitrarily applied—still persists today, but a new *Furman* would also require at least five Justices to concur. Four current Justices have found consistent problems with the death penalty (Ginsburg, Breyer, Kagan, and Sotomayor).⁷⁴ Moreover, Justices Stephen Breyer and Ruth Bader Ginsburg have explicitly called for a constitutional review by the Court.⁷⁵ But now that President Trump has replaced Justices Antonin Scalia and Anthony Kennedy with Justices Neil Gorsuch and Brett Kavanaugh, who have

⁶⁹ *ibid.*

⁷⁰ See, for example, ‘Too Broken to Fix: Part I’ (*The Fair Punishment Project*, 23 August 2016) <http://fairpunishment.org/wp-content/uploads/2016/08/FPP-TooBroken.pdf> accessed 11 June 2019. Delaware and Alabama have recently considered legislative proposals to resume or speed up the death penalty process.

⁷¹ See, for example, Editorial, ‘A Wiser Generation of Prosecutors’ (*NY Times*, 6 February 2017) <https://www.nytimes.com/2017/02/06/opinion/a-wiser-generation-of-prosecutors.html> accessed 11 June 2019.

⁷² For an in-depth discussion of the possibility of a *Furman-II* decision overturning the death penalty, see Carol Steiker and Jordan Steiker, *Courting Death: The Supreme Court and Capital Punishment* (Belknap/Harvard Press 2016) (particularly ‘The Future of the American Death Penalty’ pp 255–89). Both Steikers are authors in this compendium.

⁷³ *Furman v Georgia* 408 US 238 (1972).

⁷⁴ See R Wolf, ‘Does the death penalty serve a purpose? Supreme Court hasn’t decided either’ (*USA Today*, 12 December 2016) <https://eu.usatoday.com/story/news/politics/2016/12/12/death-penalty-supreme-court-race-disability-constitutional/94751300/> accessed 11 June 2016.

⁷⁵ See generally *Glossip v Gross*, 132 S Ct 2726 (2015) (J Breyer dissenting, joined by J Ginsburg).

already cast votes in support of the death penalty's continued constitutionality, such a review at this time would very likely validate the practice. While prior to the 2016 election there was considerable optimism that the US was on track to join the majority of abolitionist countries, now the sense is that it will take longer. A federal constitutional abolition would require the replacement of at least one of the five conservative justices currently on the Court with a more liberal justice open to such an argument. Despite the lack of immediate prospects for nationwide abolition, it remains unlikely that there will be a return to the high number of executions and death sentences of the 1990s.

Conservative states like Texas and Georgia, which have led the country in executions, are not sentencing many people to death. Both states are sentencing fewer people to death than they are executing, and that cannot last. The size of the US death row has been slowly shrinking over the past decade, and not from an increase in executions. Other previously prominent death penalty states, such as Virginia and North Carolina, hardly use the death penalty at all. As death sentences drop to near zero, executions will likely become even rarer.

Public reaction is hard to predict, but support for the death penalty is at a 40-year low, with some polls showing a majority would prefer the alternative sentence of life without parole.⁷⁶ The abolition of the death penalty in the US could have significant international implications. As the third largest country by population, it would immediately shrink the percentage of the world's population subject to the death penalty. It might influence death-penalty countries such as Japan and Taiwan, which closely follow US trends. It could also have an impact on countries like Turkey, which are in flux on their death-penalty position. Turkey's president recently justified returning to the death penalty because the US still uses it: 'Today, is there no capital punishment in America? In Russia? In China? In countries around the world? Only in European Union countries is there no capital punishment,' Erdogan said.⁷⁷

REASONS FOR THE TREND AWAY FROM THE DEATH PENALTY

In a world with such varied political philosophies and countries at different stages of economic development, it is hard to generalize about what brings about fundamental changes in the law. Nevertheless, there are some common influences unique to this era that may help explain why so many countries have abandoned the death penalty.

HUMAN RIGHTS FRAMEWORK

Hood and Hoyle attribute the success of the worldwide movement to abolish the death penalty, in part, to its framing of the issue under the umbrella of human rights. Countries differ widely in their crime rates, their historical traditions regarding the proper responses to crime, and the popular support for various forms of punishment. In an era of globalization, however, almost all countries have an interest in being respected in the world community and in advancing their

⁷⁶ See 'Year End Report 2016' (n 43) 7.

⁷⁷ 'President Erdogan: Ready to reinstate the death penalty' (*Aljazeera*, 9 July 2016) <http://www.aljazeera.com/news/2016/07/president-erdogan-ready-reinstate-death-penalty-160719015923935.html> accessed 11 June 2019.

particular goals through cooperation with other countries. The League of Nations, the United Nations, and the European Union are part of the world's response to the devastation of war and the need for mutual cooperation among countries. Beginning after World War II, countries that were shocked and tired of the rampant killing that took place were ready to accept the establishment of human rights norms to guard against abuses of the past.

Over time, much of the world community has come to believe that the death penalty is a violation of the fundamental human right to life. These countries, while starting as a distinct minority, have encouraged other countries to rid themselves of capital punishment. The approach was not dissimilar to that taken against apartheid in South Africa. Sanctions were imposed by many countries, and the issue was raised repeatedly in international forums. As countries appear isolated in a particular practice on the international stage, they feel more pressure to change. The death penalty could be on a similar path.

So, instead of a country evaluating whether the use of the death penalty might reduce its crime problem and satisfy the public's demand for retribution, it could weigh whether it wants to be recognized as a participant in a broad pursuit of human rights, which happens to include elimination of the death penalty as one of its tenets.

One of the most important international agreements embodying the core principles of human rights is the International Covenant on Civil and Political Rights (ICCPR), adopted by the United Nations General Assembly in 1966 and made effective ten years later.⁷⁸ Most of the countries of the world have now signed and ratified this treaty. The ICCPR does not forbid the death penalty, though it advocates moderation, excluding its use against juveniles and allowing it only for the most heinous crimes.⁷⁹ The Second Optional Protocol was added to this treaty in 1989 and requires signers of the protocol to abolish the death penalty. Many countries have taken this extra step as a signal of their commitment to human rights. Eighty-one countries have ratified and three others have signed the Second Optional Protocol.⁸⁰

The US has ratified the ICCPR (with reservations) but has not adopted the optional death penalty protocol. The US took a reservation to the underlying treaty in part because the death penalty was allowed in some of its states for those who were under 18 at the time of their crime. That practice was found unconstitutional by the US Supreme Court in 2005 in *Roper v Simmons*,⁸¹ which cited the ICCPR in its opinion.

The European Convention on Human Rights (ECHR)⁸² has taken a similar path, having been established in 1950, but at first allowing the death penalty as an exception to the right to life. In 1982, a new protocol was added to the treaty, providing for the abolition of the death penalty in peacetime.⁸³ Today, the European Union requires the abolition of the death penalty for all crimes as a condition of membership. All of the countries of Europe (including those not part of the EU) except Belarus have abolished the death penalty. Turkey abolished the death penalty as part of its effort to join the EU. Russia has made similar gestures, although,

⁷⁸ See ICCPR (n 26).

⁷⁹ *ibid* art 6.

⁸⁰ See Hood and Hoyle (n 14) 28.

⁸¹ *Roper v Simmons* 543 US 551 (2005).

⁸² Protocol 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 221.

⁸³ *ibid*. See also the proposed Protocol to the African Charter on Human and Peoples' Rights on the Abolition of the Death Penalty. 'Working Group on Death Penalty and Extra-Judicial, Summary or Arbitrary killings in Africa' <http://www.achpr.org/mechanisms/death-penalty> accessed 11 June 2019.

as discussed above, both countries have expressed less interest of late in becoming part of the EU, and that might affect their paths to abolition.

The EU has also had a direct effect on the use of the death penalty in the US. All of the states that practice capital punishment in the US use a form of lethal injection as their primary method of execution.⁸⁴ For many years, the drugs used in various states and the federal government were nearly identical, beginning with the first lethal injection execution in Texas in 1982. The method itself was upheld by the US Supreme Court in 2008 in *Baze v Rees*.⁸⁵

However, in 2011, the manufacturer of one of the key drugs in the lethal injection protocol, announced that it would no longer be making sodium thiopental, the drug that puts the inmate into an unconscious state. Hospira, an international pharmaceutical company and the sole provider of sodium thiopental to the US, explained that Italian workers in the plant that manufactured sodium thiopental objected to the drug's use in executions. Hospira announced that it, too, objected to this aberrant use of its product and to any of its drugs being used in executions.⁸⁶

As US states scrambled to find a replacement for sodium thiopental, the EU took action to ensure that none of its members would allow exportation of any drugs for use in the death penalty, finding that this use would fall under its prohibition of implements of torture.⁸⁷

This has had a significant impact on the practice of the death penalty in the US. Many of the drugs used in the US are manufactured in Europe by companies based in member countries of the EU. Other drug companies have issued statements similar to Hospira's condemning the use of their products for executions and have taken steps to ensure their drugs do not reach death penalty states even indirectly through wholesalers.

Many US states have had no executions for ten years or more largely because they have not been able to obtain the necessary drugs to carry out executions with at least a modicum of safety and predictability. Drug companies in the US have taken similar stands to European companies. States have resorted to keeping the names of the companies that provide execution drugs secret so as not to lose this source, and have turned to small compounding pharmacies that have been willing to prepare batches of related drugs just for this purpose, provided they remain anonymous. Other countries like China and Vietnam have adopted lethal injection as their method for at least some of their executions and would be affected if they imported the drugs needed from non-death penalty countries.⁸⁸

⁸⁴ See 'Methods of Execution' (*Death Penalty Information Center*) <http://www.deathpenaltyinfo.org/methods-execution> accessed 11 June 2019. There is considerable variation in the drugs used in lethal injection and in the options that either the state or the defendant have in choosing alternative methods of execution.

⁸⁵ *Baze v Rees* 553 US 35 (2008).

⁸⁶ See Hospira, 'Regarding the halt of production of Pentothal (sodium thiopental)' <http://www.deathpenaltyinfo.org/documents/HospiraJan2011.pdf> accessed 11 June 2019.

⁸⁷ See E Pilkington, 'Europe moves to block trade in medical drugs used in US executions' (*The Guardian*, 20 December 2011) <https://www.theguardian.com/world/2011/dec/20/death-penalty-drugs-european-commission> accessed 11 June 2019.

⁸⁸ See Cornell Center on the Death Penalty Worldwide, 'Death Penalty Worldwide Database: China' (2019) <https://www.deathpenaltyworldwide.org/country-search-post.cfm#China> accessed 19 June 2019; Cornell Center on the Death Penalty Worldwide, 'Death Penalty Worldwide Database: Vietnam' (2019) <https://www.deathpenaltyworldwide.org/country-search-post.cfm#Vietnam> accessed 19 June 2019.

Another way in which countries without the death penalty have put pressure on retentionist countries has been by refusing to comply with extradition requests.⁸⁹ Countries in the EU, Canada, Mexico, and others have refused to extradite prisoners under their control to countries with the death penalty unless the requesting country ensures that a death sentence will not be sought in the case at issue. This becomes particularly relevant in crimes of terrorism, where the perpetrators may be based outside of the target country or have escaped to other countries. If the country where the terrorism occurred wants to bring the perpetrator to justice in its own courts, it may have to first promise that the death penalty will not be pursued.

OTHER INFLUENCES: THE INNOCENCE ISSUE

A powerful development that is also giving impetus to the declining use of the death penalty is the emergence of the innocence issue in capital cases. Now that death penalty cases take longer to resolve, there is time for new evidence to emerge that may throw doubt on the original conviction. When the process was swifter and the defendant was executed quickly after trial, it was too late to remedy the situation if a mistake had been made. An executed inmate typically has no lawyer, no legal forum to bring a case, and no resources to pursue the kind of evidence that would convince the courts and the public that the worst error had been made.

But with cases in the US and elsewhere lingering for ten years or more, there is now time for witnesses to recant, for the true perpetrator to confess, or for science to develop newer, more discriminating techniques for identifying the guilty.⁹⁰ And a live client still on death row would have a lawyer, and courts might be willing to hear ‘one more appeal’ if it could mean an outright reversal of the defendant’s conviction.

In the US and elsewhere, there were often claims that someone who was executed might have been actually innocent, but definitive proof in such cases was rare. Another, and perhaps more convincing approach to the innocence issue has been the focus on inmates able to demonstrate their innocence *before* their execution. Over 150 defendants have been freed from death row in the US, often with much publicity, and have become ambassadors for ending the death penalty.⁹¹ These cases are not rare,⁹² although the overwhelming majority of those given the death penalty have not had their convictions erased.

A bedrock principle of western law is William Blackstone’s precept that it is ‘better that ten guilty persons escape than that one innocent suffer.’⁹³ This ideal is embodied in the Fifth and

⁸⁹ See, for example, *Soering v United Kingdom and Germany* 11 EHRR 439 (ECtHR, 7 July 1989) Series A no 161.

⁹⁰ Considerable literature in the form of books, law review articles, and media investigations have explored the issues surrounding wrongful convictions. For one comprehensive analysis, see B Scheck, P Neufeld and J Dwyer, *Actual Innocence: Five Days to Execution and Other Dispatches From the Wrongfully Convicted* (Doubleday 2000).

⁹¹ See ‘Innocence List’ (*Death Penalty Information Center*) <http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row> accessed 11 June 2019.

⁹² For a discussion of mistakes in capital cases outside of the US, see ‘The Inevitability of Error: The Administration of Justice in Death Penalty Cases’ (*The Death Penalty Project*, July 2014) <https://www.deathpenaltyproject.org/knowledge/the-inevitability-of-error-the-administration-of-justice-in-death-penalty-cases/> accessed 11 June 2019.

⁹³ W Blackstone, *Commentaries on the Laws of England* (Clarendon Press 1765–69) 713.

Fourteenth Amendments to the US Constitution that protect the right to due process.⁹⁴ It is this due process—along with critical fortuitous circumstances—that has led to 159 people since 1973 being freed from death row as their convictions were thrown out. In that same period there have been about 1460 executions. Thus, for every nine people executed, the system discovers one innocent person still on death row. The awareness of this problem has been fostered by a steady stream of news articles, books, TV shows and movies focusing on wrongful convictions. Almost everyone acknowledges that mistakes are made in capital cases, and many people believe the death penalty creates too great a risk to innocent life.⁹⁵

Closer examination of capital convictions has led to a greater awareness of the causes of mistakes in death penalty cases. To avoid such errors, courts and state legislatures are now providing better representation in capital cases, more resources for forensic testing such as DNA analysis, and the re-opening of the appeals process if innocence is reasonably in question. All of this has made the death penalty more costly and time consuming, further supporting the cause for its abolition.

SCIENTIFIC DEVELOPMENTS

Other advancements in science have fomented a revolution in forensic practice. Many older methods claiming to ‘prove’ a person guilty—such as fingerprint identification, hair and fiber analysis, bite mark analysis, and evidence of arson—were unscientifically applied and have been discredited, at least at providing the degree of certainty of identification claimed in the courtroom.⁹⁶

Increasingly, jurors expect clear forensic proof before they are willing to convict and sentence a person to death. If they do not see a DNA connection to the defendant or a video inculcating him, they may express reasonable doubts about his conviction, or at least lingering doubts that result in a life sentence instead of death. Prosecutors know they now have a higher burden to meet and are accepting more plea bargains in death cases or declining to seek the death penalty at all.

As more countries acquire the scientific tools for the examination of crimes and the mistakes that can occur in the process, there may be a broader conclusion that the death penalty is too risky to pursue. It is true that science may also provide the necessary proof to convict as well as exonerate, but with advancements in science also comes an awareness of the margin of error in any human endeavor. The DNA from the suspect may match the DNA at the crime scene, but questions remain: was the evidence properly collected, did it remain sealed in transport, were the laboratory and the technicians that analyzed it accredited so as to remove all doubt about the conclusions?

⁹⁴ US Constitution: amendments V and XIV.

⁹⁵ See generally, R Dieter, ‘A Crisis of Confidence: Americans’ Doubts About the Death Penalty’ (*Death Penalty Information Center*, June 2007) <https://deathpenaltyinfo.org/files/pdf/CoC.pdf> accessed 11 June 2019.

⁹⁶ See generally, Scheck, Neufeld and Dwyer (n 90).

EXEMPTIONS FOR PROTECTED GROUPS

Another way in which science has impacted the death penalty has been in the understanding of the human brain and how mental limitations can affect a person's culpability for a crime. For example, there are marked differences between the brain of an adolescent and that of an adult. This scientific realization led, in part, to the exemption from the death penalty for those under the age of 18 at the time of their crime,⁹⁷ a principle that almost all countries have adopted.

Our understanding of mental disabilities has also grown. It is now possible to identify when a young person has intellectual disabilities that will continue throughout his or her whole life. In 2002, the US Supreme Court recognized that such people are not among the most culpable offenders and should be exempt from the death penalty in keeping with our standards of human dignity.⁹⁸

In the future, we may see a similar exemption applied to those with severe mental illness, such as schizophrenia or bi-polar disorder. The American Psychiatric Association, the American Bar Association, and many other mental health organizations have called for such an exemption, similar to that applied to juveniles and those with intellectual disabilities.⁹⁹ Legislation was introduced in at least seven states in 2017 to begin the process that could lead to a complete ban in the years ahead. Even if spared the death penalty, such people are still subject to conviction and lengthy imprisonment.

ALTERNATIVE SENTENCES

Many countries deemed the death penalty necessary for the most serious crimes because they did not have secure facilities available to detain a prisoner for the length of time commensurate with their crime. Secure prisons where inmates can be kept for their entire life are now much more common. In the US, the sentence of life without parole (LWOP) is now the main alternative sentence to the death penalty. Jurors are typically given the choice between those two options and are told that a prisoner who receives LWOP will never be released while their conviction stands. All of the states with the death penalty and the federal government have a sentence of LWOP available, and all but one (Alaska) of the states without the death penalty also use LWOP sentences.¹⁰⁰

This sentence has its own critics, and many countries object to it on moral grounds. Other countries see keeping someone in prison for life as an economic burden, or they simply do not have the facilities to do so. Nevertheless, at least in the US, no state seriously considers abolishing the death penalty unless the alternative sentence is LWOP. Other countries may decide they can achieve the same degree of deterrence and protection of society by keeping someone

⁹⁷ *Roper* (n 81).

⁹⁸ *Atkins v Virginia* 536 US 304 (2002).

⁹⁹ See American Bar Association Death Penalty Due Process Review Project, 'Severe Mental Illness and the Death Penalty' (December 2016) 6 https://www.americanbar.org/content/dam/aba/images/crsj/DPDPRP/SevereMentalIllnessandtheDeathPenalty_WhitePaper.pdf accessed 19 June 2019.

¹⁰⁰ A Nellis, 'Life Goes On: The Historic Rise in Life Sentences in America' (*The Sentencing Project*, 18 September 2013) <http://www.sentencingproject.org/publications/life-goes-on-the-historic-rise-in-life-sentences-in-america/> accessed 11 June 2019.

in prison until their latter years, when rehabilitation is more likely to have occurred and resort to violence is progressively less likely. Alternative sentences and secure incarceration may meet society's demand for punishment and protection without the risks and costs—in both financial terms and in international esteem—of the death penalty.

CONCLUSION: PROSPECTS FOR THE FUTURE

In the short term, it is likely that some new countries may be added to the list of those with the death penalty. The Philippines appears on the brink of taking that step. This will have only a minor effect on the number of countries with and without the death penalty and will likely be counterbalanced by other countries abandoning the practice. It could, however, markedly increase the number of people in the world subject to the death penalty, as some of the countries threatening reinstatement have large populations.

Executions may also flare up in discrete locations. These upswings are likely to have more to do with broader political changes than with conclusions about the effectiveness of capital punishment in the criminal justice system. But the longer-term influences on the future of the death penalty will more surely include both the practical costs and risks of mistake, as well as the trajectory towards greater acknowledgment of human rights.

In the US, the death penalty has become unwieldy, costly, and unpredictable. As a result, the decline in death sentencing and executions has been dramatic, and largely immune to national politics. Even in Texas and other southern states such as Virginia, Georgia, and North Carolina, death sentences have become extremely rare.

Internationally, much of the world community has come to believe that the death penalty is a violation of the fundamental human right to life. Pressure similar to that exerted on South Africa in the successful campaign to end apartheid may be brought to bear on countries continuing to carry out executions. Just as a broader understanding of human rights has led to such cultural shifts as the end of legal slavery, the recognition of women's rights, and the expansion of democratic principles in much of the world, so, too, the death penalty may be forced into gradual obscurity.

Table 1A.1 Populations of countries that retain the use of the death penalty

Retentionist countries	Population
AFGHANISTAN	27,657,14
ANTIGUA AND BARBUDA	86,295
BAHAMAS	378,040
BAHRAIN	1,404,900
BANGLADESH	161,711,000
BARBADOS	285,000
BELARUS	9,505,200
BELIZE	380,010
BOTSWANA	2,230,905
CHAD	14,497,000
CHINA	1,380,790,000
COMOROS	806,153
CONGO (Democratic Republic)	82,243,000
CUBA	11,239,004
DOMINICA	71,293
EGYPT	92,237,100
EQUATORIAL GUINEA	1,222,442
ETHIOPIA	101,853,000
GAMBIA	1,882,450
GUATEMALA	16,176,133
GUINEA	12,947,000
GUYANA	746,900
INDIA	1,310,140,000
INDONESIA	260,581,000
IRAN	79,809,100
IRAQ	36,787,000
JAMAICA	2,723,246

26 *Comparative capital punishment*

Retentionist countries	Population
JAPAN	126,920,000
JORDAN	9,892,610
KOREA (North)	24,213,510
KUWAIT	4,183,658
LEBANON	5,988,000
LESOTHO	1,916,000
LIBYA	6,385,000
MALAYSIA	31,897,000
NIGERIA	186,988,000
OMAN	4,550,538
PAKISTAN	195,275,000
PALESTINIAN AUTHORITY	4,816,503
QATAR	2,611,522
SAINT KITTS & NEVIS	46,204
SAINT LUCIA	186,000
SAINT VINCENT & GRENADINES	109,991
SAUDI ARABIA	32,775,000
SINGAPORE	5,607,300
SOMALIA	11,079,000
SOUTH SUDAN	12,131,000
SUDAN	41,176,000
SYRIA	18,564,000
TAIWAN	23,532,065
THAILAND	68,145,000
TRINIDAD AND TOBAGO	1,353,895
UGANDA	36,860,700
UNITED ARAB EMIRATES	9,856,000
UNITED STATES OF AMERICA	325,293,000

Retentionist countries	Population	
VIETNAM	92,700,000	
YEMEN	27,478,000	
ZIMBABWE	14,240,168	
Total retentionist pop.	4,909,503,835	65.5%
World pop. (Dec. 2016)	7,500,000,000	

Table 1A.2 Potential death penalty countries

Russia	146,727,405	
Philippines	103,624,000	
Turkey	78,741,053	
Total retentionist population with these 3 countries added	5,238,596,29	69.8%

Source: Amnesty International.

Table 1A.3 US States with no death penalty or no executions in 10 years (30/50 States, plus 3 jurisdictions)

JURISDICTIONS WITH NO DEATH PENALTY	POPULATION
1. Alaska	741,894
2. Connecticut	3,576,452
3. Delaware	952,065
4. Hawaii	1,428,557
5. Illinois	12,801,539
6. Iowa	3,134,693
7. Maine	1,331,479
8. Maryland	6,016,447
9. Massachusetts	6,811,779
10. Michigan	9,928,301
11. Minnesota	5,519,952
12. New Jersey	8,944,469
13. New Mexico	2,081,015
14. New York	19,745,289
15. North Dakota	757,952
16. Rhode Island	1,056,426
17. Vermont	624,594
18. West Virginia	1,831,102
19. Wisconsin	5,778,708
20. District of Columbia	681,170

Source: https://en.wikipedia.org/wiki/List_of_US_states_and_territories_by_population.

Table IA.4 Jurisdictions with the death penalty but no executions in 10 years

JURISDICTION	POPULATION	
21. California	39,250,017	
22. Colorado	5,540,545	
23. Kansas	2,907,289	
24. Montana	1,042,520	
25. Nebraska	1,907,116	
26. Nevada	2,940,058	
27. New Hampshire	1,334,795	
28. North Carolina	10,146,788	
29. Oregon	4,093,465	
30. Pennsylvania	12,784,227	
31. Wyoming	585,501	
32. US Federal Government		
33. US Military		
TOTAL ABOLITION (in law or practice) STATES POP.	176,276,204	54.6%
TOTAL US POP. (est. July 2016)	323,127,543	

Source: <https://deathpenaltyinfo.org/jurisdictions-no-recent-executions>.