

Politics, Ethics and Capital Punishment in America

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Abstract

A critical opportunity for the abolition of capital punishment was passed in the 1970s in America. Evidence indicates that the reasons for the return of executions was not simply based on Supreme Court decisions, but propelled by a fearful reaction in American political culture to the changes wrought by the Civil Rights Movement and the turbulence of the Vietnam Era Anti-War movement. Americans demanded a visible response to their security fears as regards crime and punishment. Americans wanted more frequent and more severe punishments of those identified as perpetrator of violent crime. A second opportunity to abolish capital punishment may be emerging in the 21st century, but will the United States make the next steps in overcoming the failure of “moral arguments” over time? Critical questions regarding the application of public ethics in America can be understood in an examination of capital punishment.

Keywords: Women, Conflict, Peace building, Capacity building, Nigeria

Part I: Political Dialogue and Capital Punishment

In 2014 America witnessed another execution mess in Oklahoma. The lethal injection used to execute death-row inmate Clayton Lockett on April 30th led to a grotesque drama, with the inmate sitting up, clenching his teeth, and only expiring due to a heart attack after 43 minutes of painful exertions. The mix of drugs and the suppliers are kept secret and the administration process in Oklahoma was flawed.

Immediately afterward, Oklahoma passed a temporary halt to executions to conduct an investigation and the nation began a period of soul searching, but within the year several death penalty states began moving forward again with executions as public attention waned. The drama of the lethal injection in Oklahoma had a precedent earlier in 2014 in Ohio and was closely followed by another in Arizona. Due to the rise of disturbing deaths, faulty implementation and a national paucity of the necessary drugs, the US Supreme Court put a temporary halt to lethal injection executions in Missouri, on May 21, 2014.

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In fact, the method and procurement of drugs for lethal injection was revealed to contain serious problems, including possible legal violations (of the FDA and DEA) even though it has been the overwhelming mode of choice since 1977 in the United States.² The problems associated with lethal injections, and debates over the merits of capital punishment remain.

Officially recorded executions in the United States since 1700 are numbered at 15,723, and lethal injection has been employed since the 1970s, totaling 1,211 executions. Over the years the preferred methods of execution have changed, including hanging, firing squad, electrocution, fire and gas. (Hanging is far and away the historic leader as a means of execution since 1700) (Espy and Smykla). After May 2014, many death penalty advocates revived the electric chair into the national conversation as an alternative, and the state of Tennessee along with other states began consideration of its reintroduction.

Figure One: Capital Punishment Record in the United States over Time—1700-2014

METHOD	TIME FRAME	RECORDED NUMBER	NOTE
Burning	1700-1820	65	Peak before 1750
Firing Squad	1700-2010	130	More common before 1900; still available
Hanging	1700-1996	9,183	Peak between 1800-1950
Gas	1924-2015	593	Last used in 1999—peak 1940-60
Electrocution	1890-2015	4,439	Peak: 1890-1950; still available
Lethal Injection	1977-2015	1,211	Peak 2000-2015
Other	Before 1800	102	Drowning, suffocation, stoning, etc.
	TOTAL EXECUTIONS:	15,723	

(Information source updated and revised from M. Watt Espy and John O. Smykla, DPIC, 2014)

It is argued herein that a critical opportunity for the abolition of capital punishment was passed in the 1970s in America. Further, the evidence indicates that the reasons for the return of executions was not simply based on a decision of the Supreme Court, but that there was a fearful reaction in American political culture to the changes wrought by the Civil Rights Movement and the turbulence of the Anti-War movement. In essence, Americans demanded a visible response to their security fears as regards crime. Americans wanted more frequent and more severe punishments of those identified as perpetrator of violent crime. Critical questions regarding the application of public ethics in America can be understood in an examination of capital punishment.

Alongside the details of the messy lethal injections, Americans entered a national dialogue concerning capital punishment that pitted hopes for abolition against support for all manner of older forms of execution, including hanging, the firing squad and the electric chair (Leys, Payne & Botelho, 2014). A vivid example arose in a March 2015 bill coming out of the Senate in the Utah state legislature reinstating the firing squad as an alternative form of execution when lethal injection is either unavailable or declared to be unconstitutional.

² As drugs required for lethal injection in 2014-2015 were restricted for sale in the US, and European countries barred their shipment for use in executions, some states may have engaged in their illegal procurement.

Utah HB11 titled the "Death Penalty Procedure Amendments" not only establishes the firing squad as an alternative, but clearly states that if the intravenous drugs for lethal injection are not available, or if in the future lethal injection is declared "unconstitutional on its face," then the method of execution will be the firing squad (Utah, 2015). Some Utah legislators now argue the firing squad is *more humane* than lethal injection (McKellar, 2015).

As Americans have struggled with the definition of justice, or the meaning of cruel and unusual punishment, the resort to moral arguments on all sides has not led to a national resolution on the policy (Andre and Velasquez, 1988; Bedau, 1987). Capital punishment provides a singular example of the failure of moral arguments alone to change policy, but also a window on the vital role of the process of *public ethics* in setting the stage for possible moral transitions. In the 1970s America had a virtual moratorium on capital punishment and public support for the idea had been in decline. At that time, a critical juncture was passed. The Federal Government and the states were allowed to revive the practice of executions. This essay explores the dynamic processes of public ethics and their connection to policy and moral transitions, and why moral arguments alone are rarely enough to change public attitudes and beliefs.

Historically, debates over the moral value of capital punishment have been fruitless.³ Supporters have moral claims and opponents have moral claims, and neither can convince each other of anything because no one really knows who is right. Moral arguments about the evils or virtues of capital punishment lead to people shouting at each other that they are right, because-- they believe they are "just plain right," (MacIntyre, 1984).⁴ Political leadership also failed to set a policy course leading to abolition out of the 1970s in the US. We can imagine the historical difference in the passage of the Civil Rights Act of 1964, and the Voting Rights Act of 1965, by contrast, if national leadership in Washington had not coalesced around the civil rights movement to forge difficult law and policy, and then lead an anxious nation forward. Because capital punishment is the ultimate penalty in any society it stands as a symbol of what is working, or not working, within a criminal justice system. No living person knows the answer to the moral question of *what is due* the victims of capital crimes? If the only answer is "justice" then does that mean "blood for blood" or something different? In practical terms, the answer to the question of what the *public citizenry is due* (which is a different question) is something we can address, and a public judgment is possible.

James Q. Wilson, a formidable voice in political science and public policy concerning crime and justice, insisted that the only legitimate arguments that can be made against capital punishment must rest on moral grounds. Wilson asserted that to end capital punishment you must believe that execution is a morally excessive punishment for the crime (Wilson, 1983; 2000). Wilson did not believe it to be morally excessive (and that was enough for him). In fact, Wilson's distillation of the problem as a simple moral choice was wrong (Black, 2012). Punishment for crime is a singular area of the power of the state to use legitimate force. Since ancient time the goals have always shown a blend of several motives. Criminal punishment seeks to provide: (1) social control, (2) to legitimate the laws, and finally (3) to provide the elusive goal of *justice* (Shapiro, 1986). In this context we can distinguish between "Big J" and "little j" justice. "Little j" justice refers to basic public policy; it requires the belief that the system of resolving conflicts and punishing criminal acts is fair and operates on a rational basis (Barry, 1995).

³ The history and discourse on capital punishment is rich and deep and it will not be the goal of the essay to examine that vast scholarly heritage. Focus herein will be on the current context of capital punishment in America and the role of public ethics in public policy.

⁴ MacIntyre (1984) wrote in *After Virtue*: "The most striking feature of contemporary moral utterance is that so much of it is used to express disagreements, and the most striking feature of the debates in which these disagreements are expressed is their interminable character," (6).

“Little j justice” is also a political process where police, courts and penal institutions are all involved in demonstrating that the machine works. Public perception must hold that the system is not arbitrary and that it functions in accordance with a certain systematic mode: timely, predictable, fair and backed by the written laws. In contrast, “Big J” justice is about the oldest question in human inquiry: what is the nature of justice? What is *right* and what is *wrong*? Who is a just person and what is a good society? These questions not only emanated from Plato’s Republic, but are deeply rooted in the soil of all the most ancient codes including every book and gospel of the Bible. As John Rawls wrote, “Justice is the first virtue of social institutions, as truth is of systems of thought,” (Rawls, 1971, 3). Rawls went on to say:

“For us the primary subject of justice is the basic structure of society, or more exactly, the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation,” (Rawls 1971, 7). At the heart of human inquiry and politics is the definition of justice in society. No state can long remain viable unless the legal system and the institutions of criminal justice can deliver in a manner that garners public confidence. For modern democracy this is critical because rule of law is arguably the most essential element that sustains democratic institutions over time. Brian Barry wrote in Justice as Impartiality (1995):

“The authority of a law does indeed depend on its having been made in accordance with constitutionally mandated procedures. But it also depends upon its having been adopted in a way that gave a full chance for objectors to be heard and upon its not being open to reasonable objection—in other words on its being unjust,” (Barry, 103).

By rule of law we must always include equal justice under the law, and due process of law. Equal justice requires that all citizens, the rulers and the ruled, are governed by the same laws. Despite imperfections, a belief must prevail that the law is not politicized. Citizens must perceive that no person regardless of social and economic status, political party or official position, race or gender, is either above, or specially disadvantaged by the law (Linz and Stepan, 1996).⁵ Modern rule of law is vital to democratic republics and although imperfect in practical application the law *must be believed* to be fair (Schuck, 2000; Barry, 1995). No law is self-executing, and thus, the people in a democracy are an active reflection of the laws and the law must support their values and identity (Schuck, 2000, 434-435).

For centuries most executions were public affairs, and capital punishment is about the audience as much as punishment for crime. If there is to be no audience, and no moral lesson, then the *justice* in capital punishment begins to dissolve; executions become tantamount to state terror and homicide. The last public execution on record in the United States took place in Owensboro, Kentucky, on August 14, 1936. This was the hanging of Rainey Bethea, and although convicted of murder and rape the press was so outraged at the spectacle, a ban on public executions began and has continued to this day (Randa, 1997). The United States has ever since attempted a difficult balance by making public announcement of executions to provide the sense of legal transparency along with a nod to the deterrent effect of capital punishment, but simultaneously acknowledging that there is something abhorrent in public witness of executions. The idea that public execution will teach lessons to the public is old, (and may still occur on occasion in some parts of the world). Looking back over time, even the word *trial* for our court processes can be traced to the concept of *trial by ordeal* (Shapiro, 1986). In trial by ordeal, justice was distributed by fate and the right hand of God determining the righteous person.

⁵ In “Toward Consolidated Democracies,” Linz and Stepan cite the critical need for a *Rechtsstaat*, or rule of law for a “consolidated democracy” to sustain the relationship between civil and political society in a way that protects their autonomy. Rule of law is linked to the wider social consensus derived from constitutionalism.

Torture, though still practiced, is globally viewed as unlawful, impractical and immoral; it is an international crime according to the 1984 *Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment* passed by the United Nations, supplemented by the *Optional Protocol Against Torture* passed in 2002, and formally defined as an international crime by Article 38 of the International Court of Justice.⁶ The prohibitions on torture in international law pertain even during times of war (Sussman, 2008). The example of state sponsored torture is illustrative that public ethics can guide people in new directions, and that changes of acceptable policy are more than a modest alteration in custom or manners. The practice is simultaneously understood to be inhumane and wrong (Sussman, 2008, 189-211). Trial by ordeal could not stand the test of time and reason and neither has torture or public executions. This suggests that practical human experience, concrete standards and public dialogue are a compelling means for shifting policy and practices in capital crimes.

The history of the death penalty can be traced to the Eighteenth Century BCE and the *Code of Hammurabi* in Babylon. Capital crimes are detailed in all the ancient codes including the *Twelve Tablets of Rome* in the Fifth Century BCE. William the Conqueror in Britain is known for being among the first monarch to limit execution to only crimes of murder in the Eleventh Century (Randa, 1997). Eventually, the abolition movement can be traced to the Enlightenment among philosophers like Montesquieu, Voltaire, the English Quakers, and many others. In 1767, Cesare Beccaria offered a pivotal corner stone in the abolition history in his essay *On Crimes and Punishment* (1767), which had some influence in Northern Europe. Beccaria argued that there was no crime for which the state had a legitimate right to take a human life. Beccaria reasoned that in light of social contract theory no reasonable person would contract with the state to take his or her life. Around the same time, in the 1700s, the earliest American abolitionists began the push to end capital punishment, instigating progress toward limiting the applications, until Michigan became the first state to outlaw executions in 1847.

Interest in abolition waned, especially during the Civil War, but re-emerged at the turn of the century. During the Progressive Era, between 1907 and 1917, nine more states abolished the death penalty. In the post World War Two period public support for the death penalty began to decline significantly in America, and fewer executions were taking place, but it was not until 1972 in the case of *Furman v. Georgia* that the U.S. Supreme Court [following a series of earlier cases, especially *Witherspoon v. Illinois*, 391 US 510 (1968)] voided forty death penalty statutes and suspended capital punishment. Even so, by 1977 Utah and Oklahoma had begun executions again following the *Gregg* decision (*Gregg v. Georgia*, 428 US 153; *Jurek v. Texas*, 428 U.S. 262; and *Proffitt v. Florida*, 428 U.S. 242). In 1977 Oklahoma was the first state to use lethal injection. Since 1977, 32 states have retained the death penalty while 18 have abolished the practice. The period between 1972 and 1977 was a crucial moment; this was a point at which the process of public ethics had prepared a natural path to abolition, but failed to deliver.

In this summary of the history of the death penalty a pattern emerges since the mid 1700s in America. As each decade passed America began to limit the use of executions. The methods employed changed as Americans struggled to agree on more humane methods of execution. From the early days of fire and stone through hanging and electrocution and finally to lethal injection, the desire to find a mode of execution that was *tolerable* has not ceased. Slowly more states abolished the practice after 1847. In addition, public executions ended in 1936, and abolition was the national law in the 1970s.

⁶ David Sussman (2008) argues that there is "something morally special about torture that distinguishes it from most other kinds of violence" (190). Sussman argues that torture operates to not only be obscenely cruel, but to prompt a kind of "forced self-betrayal, more akin to rape," (190).

At that moment, during the moratorium of the 1970s, an opportunity for abolition was missed. In the second decade of the Twenty-first century Americans are again poised to confront a primary ethical question: does capital punishment serve society and the call for justice constructively? If moral grounds are to form the basis for that debate, as James Q. Wilson suggested, then America could once again fail to conclude a national policy of abolition.

Part II: Morality, Ethics, and Public Ethics

Ethics, or moral philosophy, is the inquiry into the habits of character that lead to right judgment (Gutmann and Thompson, 1997). Ethics refer to behaviors and codes that may or may not be directed by moral principles. In contrast, morality and morals derive from our internal sense of what is right and what is wrong. We generally perceive our moral beliefs as personal and though they may often be defined by a code of ethics and ethical conduct, morality is aimed at the outcomes. Ethics are aimed at the means.⁷ The close relationship between ethics and morality may be viewed in the following way: murder can be seen as ethically wrong because murder leads to a terrible society. The damage to others makes murder wrong because of the consequences to people and social relationships. Morality looks directly at the act in itself such that murder is believed to be morally wrong because murder is reprehensible and rejects our personal moral code of beliefs. A "moral person" is guided by principles of right and wrong and their internal definition of a higher covenant. The interplay between ethics and morals is essential. Ethical codes that a person accepts might be shaped or selected based upon an individual's moral compass and at the same time, ethical codes and principles may shape morality. People may possess many conflicting and individualized moral beliefs, but in the public realm, ethical principles, guided by experience or what works best to make a better society will influence the habits and behaviors of citizens.⁸

Ethical behavior is not limited to following codes or rules. As a part of moral philosophy ethics refer to behaviors that are considered right actions. In this sense they must contain a certain universal application and character. In Practical Ethics, (2011) Peter Singer responds to a question he posed to himself, "Why should I act morally?" Singer wrote: "It is a question about the ethical point of view, asked from a position outside it. But what is the 'ethical point of view'? I have suggested that a distinguishing feature of ethics is that ethical judgments are universalisable. Ethics require us to go beyond our own personal point of view to a standpoint like that of the impartial spectator who takes a universal point of view," (Singer, 2011, p.317). Singer connects moral behavior to the universal application of ethics whereby as human beings we look outside our personal perspective to see the consequences of our actions. From this vantage point people eventually find universal bases for ethical judgment and ultimately moral behavior.

Our moral compass can be shifted by engaging in ethical dialogue fashioned in the public square. In the Nicomachean Ethics, (1985) Aristotle argued that we learn just acts by the practice of doing them, and the learning of the habits of justice, from our earliest years makes all the difference in the world. For Aristotle this carried over into the public realm:

⁷ In moral philosophy, ethics and morals are often used interchangeably as if they were pretty much the same thing, and this is not necessarily wrong. The inter-relationship between the two is simultaneous. Even so, in this essay the distinction between ethics and morals is drawn more vividly to highlight public ethics as an independent concept that accounts for the learned practices and codes that are autonomous in relation to abstract moral principles. See Felice, 2009; and especially Alasdair MacIntyre (1984), After Virtue.

⁸ See Arthur Kleinman, *What Really Matters* (2006). Psychiatrist and medical anthropologist, Arthur Kleinman finds that the powerful forces of politics and political economy are the "disorganizing historical forces" that change moral lives. He wrote: "If there is to be an ethics that humanly matters, then it must be a part of the moral-emotional-political messiness that is what local life is," (122).

“For the legislator makes citizens good by habituating them, and this is the wish of every legislator; if he fails to do it well he misses his goal. [The right] habituation is what makes the difference between a good political system and a bad one,” (Aristotle Book II, Ch. 2).

Public ethics are the virtues and principles that we share, from practice (habit), by our communally grounded understanding and are the things we choose to do not or not do in respect to our understanding of the public good. For Aristotle, virtues were neither feelings nor natural capacities; virtue (or ethical behavior) requires decision and action beyond potential and emotion (Aristotle, 1985). The conception of public ethics applied to capital punishment seeks to identify the trends and principles that guide constructive social choices. Through the lens of public ethics, the tension in law and justice between a utilitarian or justice based understanding of criminal punishment is resolved. A classical Liberal understanding of crime and punishment could draw from utilitarian, or a number of other perspectives, for example Immanuel Kant. Even so, a utilitarian approach, strictly speaking, is not enough if geared to evaluating whether or not the act of capital punishment, in other words the death of the condemned and the loss of life, is balanced by some resulting social benefits (Mill, 1985). Utilitarian ethics alone does not resolve the conflict between the differing moral objection positions very easily. A utilitarian might focus entirely on the actual harm or goods produced by the death penalty.⁹ In some ways America has been caught in a looping debate in this vein.

From a Kantian perspective, capital punishment obstinately resists the application of Kant's *Categorical Imperative*. Immanuel Kant's position on capital punishment favors its application but here again the moral principle objection would interfere. A Kantian orientation is potentially applicable because Kant saw Duty to the abstract moral principle defined by Reason as the final arbiter in moral choice (Kant, 1797). If capital punishment is about a moral choice, then the Duty to act morally is prescribed by the rational nature of human beings. Immoral acts are violations of reason, and the moral law is an abstract principle. Kant argued that judicial punishment is imposed for one simple reason: because a person has committed a crime.

“But what kind and what degree of punishment does public justice take as its principle norm? None other than the principle of equality in the movement of the pointer on the scales of justice, the principle of not inclining to one side more than to the other. Thus any undeserved evil which you do to someone else among the people is an evil done to yourself,” (Kant, 155).

This leads Kant to argue that therefore: “All murderers, whether they have themselves done the deed, ordered it to be done, or acted as accomplices, must suffer the death penalty,” (Kant, 157). Kant went further, discounting the arguments of abolitionists, like Beccaria, as “pure sophistry,” (Kant, 158-159). Extending the argument against abolitionist claims to its fullest, Kant opined that beyond murder, execution *may* be warranted in two more crimes: in cases of infanticide and a comrade killing his brothers in arms during time of war. Perhaps, based on a moral principle prescribed by human reason, Kant's rule would be sufficient for all arguments, but it relies completely on a relationship between the autonomous individual and an abstract principle of the moral law (Taylor, 2007). Kant's Categorical Imperative does not cut the knot of disagreement over capital punishment in the 21st century, in part because human reason has *moved the pointer on the scales of justice* since 1797.

⁹ See R. Pestritto, (1996), where he outlines the ambivalence expressed by the American Founders in the area of crime and punishment. He wrote: “The tension between a utilitarian understanding of punishment and justice-based understanding is not new” (1). John Stuart Mill [1863] had similar difficulty when making practical applications of utilitarian precepts. Utilitarian assessments of the death penalty are common, and generally unsatisfying.

With the passage of time and experience Kant's abstract solution for "all murderers" takes no account of public ethics as a social construction of the public good in our times.

Part III: Four Questions

Moral abolitionists may argue that prison is punishment enough, and executions are inhumane and violate human rights. They may also pin arguments on the higher costs of death row, the pain of death, the failure of people playing God, and the danger of wrongful convictions without resort to the possibility of either regret or forgiveness. All the same, these arguments stem from an internal moral belief. *Moral retentionists* (like James Q. Wilson) will argue that capital punishment is appropriate and morally right. Retentionists will argue that justice must be done for extreme crimes, so the punishment must also be extreme and commensurate (Perez-Pena, 2000).

Capital punishment can be evaluated by criteria that do not assume a moral position. Concrete questions that emanate from the requirements of effective systems of justice may be asked without resort to moral prescriptions. Is capital punishment: 1) swift and sure; 2) equitably distributed; 3) cost-effective; and 4) does US policy compare favorably with other countries? Moral judgments concerning the answers to these questions are left to the observer and later analysis. Criminal justice systems are assessed primarily by the criteria of speed and confidence, fairness, costs and the view of the outside world and the judgments of other nations (Wilson, 2008; 1983). Public ethics are informed by what is experienced by citizens; moral judgments may only come later and with the passage of time.

The four questions posed respond to the question: *what is the public citizenry due* in the application of capital punishment and not *what is due the victims* of capital crimes? If we are to accept execution as a matter of public policy then that policy must deliver while reinforcing primary social values. According to the basics of rule of law principles, the punishment must not be lingering and indeterminate, but delivered within reasonable time tables, and it must be certain to land on those criminals we know deserve. Taking a life is an action whose consequences are permanent. Support of executions must rest not only on prosecutorial certainty, but on the confidence that the penalty is fairly distributed.

The rule of law requires that no one is above the law, but that also no person or group is specially disadvantaged for any reason. To maintain retention of the death penalty, it must be proven to society that the policy and its implementation do not impose excessive costs. If reasonable and commensurate penalties provide the same effects in safety, security and deterrence of crime at diminished expense to all, then it is rational to question the public good of capital punishment. Finally, comparing US policy with those of other nations may provide some guidance in the matter of the policy. In the public dialogue, the beliefs of citizens may be influenced by knowledge of where their nation stands in contrast to others like themselves (Appiah, 2010).¹⁰ For the philosopher Aristotle, all things have an end, or *telos*, and he believed public life was a measure of the highest meaning in human existence (Aristotle, 1985).

¹⁰ See Kwame Anthony Appiah's [The Honor Code: How Moral Revolutions Happen](#), (2010). Appiah analyzes four case studies: honor dueling, footbinding in China, the Atlantic slave trade and honor killing of women. Each case reveals patterns wherein practices once undertaken as "honorable" are flipped and become viewed as signs of dishonor. In each case, changes in social and economic relationships, new social movements, and the judgment of the wider international community are crucial in moving society toward "moral revolutions." Principled moral debates do play a role, but as Appiah found, in alliance with social economic transformations and new social and international forces. So for example, centuries long customs like dueling or footbinding, practiced by elites, eventually are recast as cruel, dispensable and dishonorable.

According to Hannah Arendt in The Human Condition, the ancients believed that justice and the spirit of excellence in the human experience are possible when people forsake private gain for public good (Arendt, 1958). Does capital punishment today contribute to the public good and provide value to American society in terms of effectiveness and the delivery of *justice*?

In answering this question, we therefore have four measureable standards: 1) is the punishment swift and sure; 2) is it equitably distributed; 3) is it cost-effective; and 4) can we judge US policy in comparison to other countries? These standards avoid the moral objection disagreements although they may open the door to contemplation of moral *questions*.

Swift and Sure?

Between 1973 and 2014, through appeal and combined with the rise of DNA testing, 150 persons on death row have been exonerated (DPIC, 2014). We know today that the system is imperfect. According to a new study in 2014 conducted by Samuel Gross, Barbara O'Brien, Chen Hu and Edward H. Kennedy portrayal of miscarriage of justice is possible (Gross et. al. 2014). Employing new methodologies the researchers concluded that at least 4.1% of criminal defendants receiving the death penalty are falsely convicted (Gross, et.al. 2014). In fact, the study which was also highlighted in Scientific American (2014) argued that the known number of potential exonerations could be much higher (Maron, 2014). Although people may disagree over the number of *acceptable* false convictions, no one can argue that the system is infallible. As Amnesty International (2015) observed, since 1973 there is not only a considerable number of exonerations, but in 2003 alone ten wrongfully convicted people were released from death row (Amnesty, 2014).

Figure Two: Death Row Exonerations by Year; 1973-2014

YEARS	EXONERATIONS	
1973-1977	11	11.2 years average time served on Death before release. ----- From: DPIC, (2014). "Innocence Report; Amnesty International, (2015) "Death Penal Innocence."
1978-1982	11	
1983-1987	12	
1988-1992	13	
1993-1997	25	
1998-2002	28	
2003-2007	24	
2008-2012	18	Total = 150 Exonerations
2013-2014	8	20 = number of DNA cases

Time spent living on death row by the convicted has more than doubled over the last thirty years. According to the Department of Justice, time on death row jumped from seven years on average in 1986 to twelve years in 2006 (Snell, *BJS*, 2014). Once again, people may disagree over what is an acceptable length of time to wait for execution, hence the operative definition of what is considered "swift" is open to question. What is not in question is the expansion of time lived on death row.

Figure Three: Average Time Served on Death Row Nationally; 1990-2012

Year	Number of Executions	Average time in Years
1985	18	5.9
1986	18	7.25
1987	25	7.16
1988	11	6.6
1989	16	7.9
1990	23	7.9
1991	14	9.6
1992	31	9.5
1993	38	9.4
1994	31	10.16
1995	56	11.16
1996	45	10.4
1997	74	11.08
1998	68	10.08
1999	98	11.9
2000	85	11.4
2001	66	11.8
2002	71	10.58
2003	65	10.9
2004	59	11.0
2005	60	12.25
2006	53	12.08
2007	42	12.75
2008	37	11.58
2009	52	14.08
2010	46	14.83
2011	43	16.5
2012	43	15.8

***Adapted from: Tracy L. Snell, U.S. Department of justice, Bureau of Justice Statistics, May 2014**

By 2009 the average waiting time for all death row inmates was fourteen years. In California a normal waiting time today can be as long as twenty years (Alarcon and Mitchell, 2012). In 2011 twenty-four death row inmates died of natural causes. In 2005 137 death row inmates were sixty years and older. For the most part, death row inmates committed their crimes in their youth, so that many years have passed before their execution. This leads to the odd circumstance of putting senior citizens to death (Rapaport, 2012). The longer periods before execution create multiple costs and collateral difficulties. Health care for those who become ill and aged is added to the appeals and court fees generated by the system. There are many reasons for the lengthening of time on death row. No single policy or reform short of abolition will likely lead to more swift executions of sentence. The system of capital punishment is not completely certain, and it is far less expeditious than it was forty years ago.

Fair and Equitably Distributed?

Capital punishment is distributed asymmetrically across the United States such that 32 states have the penalty while 18 do not. Therefore the sentence of capital punishment depends on *where* the crime is committed. It is also commonly known that the death penalty is unequally distributed by race and gender and the empirical data supporting that conclusion are quite comprehensive. Below are some samples to illustrate the distribution by race and gender. According to *The Death Penalty Information Center* (DPIC) and the Department of Justice- Bureau of Justice Statistics data, since 1976 the racial composition of those executed was as follows: Black 474, at 34%; Latino 110 at 8%; and White 771 at 56%. The current national population by race on Death Row is: Black 1,285 at 47%; Latino 391 at 13%; and White 1,335 at 43%. The 2010 census of the US population showed Whites at 72.4 %, African-Americans at 12.6% and Hispanics at 16.3%. Death Row is disproportionately composed of non-White condemned prisoners in the 32 states still holding the death penalty. In the provocative work of Michelle Alexander, *The New Jim Crow* (2010) the author details how the criminal justice system in America became in our times a caste system. The system of crime and punishment replaced Jim Crow and segregation by creating the pretence of color blindness while seamlessly exploiting the racial resentments of working class whites. The prison system filled as, “mass incarceration of communities of color was explained in race-neutral terms, an adaptation to the needs and demands of the current political climate. The New Jim Crow was born,” (Alexander, 58).

Figure Four (a): Race and Gender in Capital Punishment Seven Select states (over 100 death row inmates); Inmates by Racial Composition

State	Total	Black	White	Hispanic	Percentage State Black Population
Alabama	198	104	90	3	26.1%
Arizona	123	16	76	26	3.8%
California	745	269	257	181	5.8%
Florida	404	153	217	31	15.2%
No. Carolina	160	81	65	5	21.2%
Ohio	144	77	62	3	12.0%
Texas	276	115	76	80	11.5%

Figure Four (b): Race and Gender in Capital Punishment

2012 On Death Row Demographics	Male 98.0%	Female 2.0%	White 55.8%	Black 41.9%	Hispanic 14.0%
Race of Homicide Victims resulting in executions since 1976	White 77%	Black 15%	Hispanic 6%	Other 2%	
Race of Homicide victims resulting in capital sentences since 1976	White 56%	Black 34%	Hispanic 8%	Other 2%	Total 1,403 executions

Figure Four (c): Race and Gender in Capital Punishment

US Census Data 2010	Male	Female	White	Black (African-American)	Hispanic or Latino
	49.2%	50.8%	72.4%	12.6%	16.3%

[Data for Figures Four a, b, c are from the US Census, DPIC, and Bureau of Justice statistical indices].*

In Alexander's devastating indictment of the American criminal justice system, ninety percent of those arrested for drug crimes (for example) were either Black or Hispanic. Alexander wrote: "In the era of mass incarceration, what it means to be criminal in our collective consciousness has become conflated with what it means to be black, so the term *white criminal* is confounding, while the term *black criminal* is nearly redundant," (Alexander 198).

Death row, as a quick scan of the numbers for states like Alabama, California, Ohio and Texas indicate, [Figure Four (a)] disproportionately represents this color line. Another interesting point is that the rate of execution for victims is also race sensitive. Despite the fact that African Americans suffer as victims of murder at nearly fifty percent nationally, the likelihood of execution improves if the victim was white (Amnesty, 2015). [See Figure Four (b)].

Gender is unequally distributed as women make up 51% of the US population yet since 1903 only 53 women have been executed and only 15 women since 1984. Even a most heinous crime might not garner a capital conviction in the case of a woman. The most executions of women since 1984 have taken place in two states: Texas (6) and Oklahoma (3). The death penalty is not equitably distributed by state, race, ethnicity or gender.

Cost Effective?

The average cost per year nationally for a Death Row inmate is \$90,000 more than those in life imprisonment, according to a *Death Penalty Information Center* (DPIC) study (DPIC, 2014). Estimates by the Death Penalty states and the Department of Justice- Bureau of Justice Statistics corroborate similar numbers. For example the state of Tennessee Death Row costs 48% more than high security life imprisonment. Florida would save \$51 million dollars a year without Death Row. Oregon estimates at least 50% more is spent on Death Row inmates and California has estimated \$90 million dollars a year in extra cost. California is not only the leading state for time spent on death row (estimated 20 years), the costs of the system are considerable. According to a study by Judge Arthur Alarcon and Paula Mitchell (2012) the death penalty has added \$4.6 billion dollars to the tax payer's burden. These costs include: \$775 million dollars for Federal Habeas Corpus Appeals, Pre-Trial and Trial costs of \$1.94 billion dollars, Automatic Appeals and State Habeas Corpus Appeals costing \$925 million dollars and the costs of incarceration totaling \$1 billion dollars. Alarcon and Mitchell conclude that California must either "mend or end" capital punishment.

A 2014 study in Washington State concluded that each case where the *Death Penalty is Sought* (DPS) costs over one million dollars more than all cases where the *Death Penalty is Not Sought* (DPNS): "Combining all cost categories, the average total costs to the justice system related to pursuit of the death penalty are about 1.4 to 1.5 times more expensive than DPNS cases. The total average difference in costs when the death penalty is sought is \$1,058,885 in 2010 dollars, or \$1,152,808 in 2014 dollars", (Collins, et.al., 2014).

The research position of the authors in Washington was purely economic. A recent state audit in Nevada drew similar conclusions. In a finding by the Nevada Legislative Auditor, each DPS case costs on average \$532,000.00 dollars more than capital DPNS cases (Nevada, 2014). Studies across the death penalty states in Kansas, Maryland, Idaho, Colorado and many others all come to similar findings. Even the state of Texas (a death penalty leader) has found that the state spends an extra \$2.3 million dollars per death row inmate annually, rated at three times the cost of the highest security single cell (DPIC, 2014). By using the estimates of death penalty states themselves it is strongly suggested that death row and the death penalty process as it currently is conducted is more expensive than the alternatives. Death Row and the death penalty are not more cost effective than lifetime incarceration.

Compares Well Globally?

In comparing the American practice of the death penalty with other nations it is fair to consider the special characteristics of the American system. Federalism has allowed for each state to assert its right to set policy and law in many areas. Over time the competition between the federal government and state governments has commonly led to the acquiescence of the states especially where inter-state commerce and civil rights and liberties are in play. In the case of capital punishment the regional differences of attitude and culture are revealed. Oklahoma and Texas are leading states for retention but the murder and violent crime rates in these states are no lower for the existence of capital punishment. The claim to a deterrent function weakens beside the more vociferous moral arguments. All the same, America is unlike other countries in both its history and character. It is fair to wonder to what extent most Americans would be moved by comparisons with other nations, especially when most other modern, democratic republics have discarded the death penalty?

The top six countries in the world in executions in 2013 according to *Amnesty International* were as follows: 1) China (in the 1,000's); 2) Iran (369+); 3) Iraq (169+); 4) Saudi Arabia (79+); 5) United States (39); 6) Somalia (34+). Figure five compares the 58 nations where the death penalty may be permitted with execution estimates from 2010 to 2015. One country consistently close to the United States at between 30 and 40 executions each year is Yemen, which in 2015 is a failed state. Among the countries that retain the death penalty we can name Afghanistan, Botswana, Egypt, Libya, Sudan, Pakistan, Cuba, Kuwait, No. Korea, Uganda and Vietnam. Among the 58 retentionist nations in Figure Five, only 14 (including the United States) are rated as "Free" and only one other nation (Japan) joins the United States as a "Full Democracy." There are 10 nations rated as "Democratic" states. The remaining 46 nations range across all manner of autocratic and non-democratic regimes. Finally, many of the nations that retain capital punishment are poorer and less well educated than the United States when comparing GDP per capita and literacy. In contrast, among the approximately 98 countries in the world where the death penalty is outlawed are Albania, Australia, Canada, Mexico, United Kingdom, Netherlands, New Zealand, Norway, Panama, Poland, Denmark, France, Finland, Germany, Italy, Rwanda and Sweden. In general, abolitionist nations cover all of the European Union, Scandinavia, and the British Commonwealth. Seven more nations have abolished capital punishment except for the most extraordinary crimes, among these Israel and Brazil, which arguably expands the total number of abolitionist states to 106.

Figure Five: International Comparisons; 58 Countries that Nominally Retain the Death Penalty for Ordinary Crimes 2015

Country	Executions 2010-2015 *Estimate	Literacy Rate	GDP Per Capita PPP	Polity IV Rating: [if known]	Freedom House Rank	Freedom House— Free Press
Afghanistan	27*	28.1%	\$1,100	Failed/Occupied	Not free	Not free
Antigua - Barbuda	0	99%	\$18,400	*	Free	Partly Free
Bahamas	0	95.6%	\$32,000	*	Free	Free
Bahrain	1	94.6%	\$29,800	Autocracy	Not Free	Not Free
Bangladesh	17	57.7%	\$21,000	Open Anocracy	Partly Free	Partly Free
Barbados	0	99.7%	\$25,100	*	Free	Free
Belarus	10*	99.6%	\$16,100	Autocracy	Not Free	Not Free
Belize	0	76.9%	\$8,800	*	Free	Free
Botswana	4*	85.1%	\$16,400	Democracy	Free	Partly Free
Chad	0*	35.4%	\$2,500	Closed Anocracy	Not Free	Not Free
China	+18,000*	95.1%	\$9,800	Autocracy	Not Free	Not Free
Comoros	0	75.5%	\$1,300	Open Anocracy	Partly Free	Partly Free
Congo (DR)	0*	66.8%	\$400	Open Anocracy	Not Free	Not Free
Cuba	0	99.8%	\$10,200	Autocracy	Not Free	Not Free
Dominica	0	94%	\$14,300	*	Free	Free
Egypt	13*	73.9%	\$6,600	Closed Anocracy	Not Free	Not Free
Equatorial Guinea	4*	94.2%	\$25,700	Closed Anocracy	Not Free	Not Free
Ethiopia	0*	39%	\$1,300	Closed Anocracy	Not Free	Not Free
Gambia	10*	51.1%	\$2,000	Closed Anocracy	Not Free	Not Free
Guatemala	0	75.9%	\$5,300	Democracy	Partly Free	Partly Free
Guinea	0	41%	\$1,100	Open Anocracy	Partly Free	Not Free
Guyana	0	91.8%	\$8,500	Democracy	Partly Free	Free
India	2	62.8%	\$4,000	Democracy	Partly Free	Free
Indonesia	11	92.8%	\$5,200	Democracy	Partly Free	Partly Free
Iran	3,517*	85%	\$12,800	Autocracy	Not Free	Not Free
Iraq	+444*	78.5%	\$7,100	Open Anocracy	Not Free	Not Free
Jamaica	0	87%	\$9,000	Democracy	Free	Free
Japan	20	99%	\$37,000	Full Democracy	Free	Free
Jordan	19*	95.9%	\$6,000	Closed Anocracy	Not Free	Not Free
No. Korea	+168*	(100%)*	(\$1,800)*	Autocracy	Not Free	Not Free
Kuwait	5	93.9%	\$42,100	Autocracy	Partly Free	Partly Free
Lebanon	0	89.6%	\$15,800	Open Anocracy	Partly Free	Partly Free
Lesotho	0	89.6%	\$2,200	Democracy	Partly Free	Free
Libya	0*	89.5%	(\$11,300)*	Failed	Not Free	Not Free
Malaysia	5*	93.1%	\$17,500	Democracy	Partly Free	Not Free
Continued:	Executions	Literacy	GDP pc	Polity IV	FH Rank	FH Press
Nigeria	4	61.3%	\$2,800	Open Anocracy	Partly Free	Partly Free
Oman	0	86.9%	\$29,800	Autocracy	Not Free	Not Free
Pakistan	23*	54.9%	\$3,100	Democracy*	Not Free	Partly Free
Palestinian Authority	(45*)	*	*	*	*	*

Qatar	0	96.3%	\$102,100	Autocracy	Not Free	Not Free
Saint Kitts & Nevis	0	97.8%	\$16,300	*	Free	Free
Saint Lucia	0	90.1%	\$13,100	*	Free	Free
St. Vincent Grenadines	0	96%	\$12,100	*	Free	Free
Saudi Arabia	380*	87.2%	\$31,300	Autocracy	Not Free	Not Free
Singapore	4*	95.9%	\$62,400	Closed Anocracy	Partly Free	Partly Free
Somalia	+(82)*	37.8%	\$600	Open Anocracy	Not Free	Not Free
So. Sudan	*	27%	\$1,400	Failed/Occupied	Not Free	Not Free
Sudan	+62*	71.9%	\$2,600	Closed Anocracy	Not Free	Not free
Syria	+(28)*	84.1%	\$5,100	Autocracy	Not Free	Not Free
Taiwan	+26*	96.1%	\$39,600	Democracy	Free	Free
Thailand	0	93.5%	\$9,900	Democracy	Not Free	Not Free
Trinidad-Tobago	0	98.8%	\$20,300	Democracy	Free	Free
Uganda	0*	73.2%	\$1,500	Closed Anocracy	Not Free	Not Free
United Arab Emir.	3	90%	\$29,900	Autocracy	Not Free	Not Free
United States	213	99%	\$52,800	Full Democracy	Free	Free
Vietnam	14*	93.4%	\$4,000	Autocracy	Not Free	Not Free
Yemen	+135*	65.3%	\$2,500	Open Anocracy*	Not Free	Not Free
Zimbabwe	0	83.6%	\$600	Open Anocracy	Not Free	Not Free

Sources: CIA World Fact Book, (2015); Freedom House (2015); Polity IV Project, (2015); Death Penalty Worldwide--Cornell University Law School, (2015). * Denotes "Best Estimates."

Do Americans really desire to be the fifth most energetic executioner in the world? Given the trials that a nation like Rwanda has endured over the last twenty years, it is reasonable to ask how Rwanda outlawed the death penalty when it is not possible for the United States. Would "honor" require that America join the company of other democracies? (Appiah)

Part IV: Politics, Ethics and the Death Penalty

Capital punishment should be abolished but not simply or fundamentally on moral grounds. Capital punishment should be abolished because it does not work and because a majority of nations, most of whom are democratic republics like the United States, have abandoned the practice. Capital punishment should be abolished because of the way it is implemented, and the long train of history and law since the 1700s reveals that the state and American society struggled with both the mode and the justifications for executions. The failure in public policy driven by heated moral claims extended the life of American capital punishment. In the 1970s a time was ripe, and the pieces were in position to end the practice on a nation-wide basis once and for all, but that did not happen.

The reasons capital punishment survived into the 21st century in America are multiple, but we may speculate as to the causes. The supporters of retention of capital punishment have held their position legally on a combination of factors that may include: conflicting religious convictions, a violent history embedded in American culture, various racial and ethnic tribalisms and beliefs, and strong regional differences about the morality of the practice.

In the 1970s the Civil Rights Movement was still unfolding, and the Vietnam War was just coming to a close. American memories were seared by the experiences of social upheaval, violence in the streets, political demonstrations and assassinations of leaders. The effects of desegregation and reactions to the changes were unsettling, yet unpredictable, and to many white Americans in parts of the country, unacceptable. Racial and economic inequality and decades of turmoil may have bred fear and there was a palpable desire for something called “law and order” within the broader White majority. President Richard Nixon employed those fears in his runs for the Presidency, and a kind of backlash likely induced a misplaced sense of confidence in capital punishment. Like other areas of the American criminal justice system, (e.g. mandatory minimum sentences for drug crimes) a desire for tough punishments became allied with demands for greater security in changing times. Capital punishment may have survived as a symbolic overture to those demanding security, order, and acting on racial fears.

Was James Q. Wilson (2008) right when he observed that the murder rate in America is higher than other European nations because as he said, “To put it bluntly, Americans are a more violent people than are the British, though the latter have been trying hard to catch up?” (Wilson, 2008, 479). Wilson’s observation was ironic given that the British were also the people that once gave the world the practice of “drawing and quartering” and imposed many a violent policy in the expansion of empire. The point is that on both practical and ethical grounds there is no current justification for the policy of executions in America. Retaining capital punishment as it is practiced in the United States has been the wrong policy; it has been the wrong thing to do in light of the public good because it is unfair, arbitrary, costly and unseemly.

For “moral revolutions” to occur, moral convictions are not enough. In time the customs and beliefs of the past must be tested against their practical effects on society. Capital punishment, long argued to be a form of justice is, in its American application, a most unjust policy. Capital punishment is not economically defensible and considerable voices from the outside world have shown their contempt for the American death penalty. For example, just as Britain would not join in the Civil War on the side of the Confederacy due to slavery, European Union (EU) nations will not extradite criminals to the United States if the death penalty is in play. Since 2011 the EU has banned export of drugs which could be used for executions by lethal injection.

The US Supreme Court in *Roper v. Simmons* 543 U.S. 551 (2005) was forced to consider the amicus curiae brief from the EU concerning the execution of minor persons at the time their crimes were committed, and recognized that world public opinion cannot be ignored. Even so, American law has tended to exclude the *Universal Declaration of Human Rights* from any connection in death penalty cases, especially since the 1976 *Gregg* decision (Jouet, 2014). Given the experience of the past one hundred years, a practice once conceived as justice is not only unjust in application, but might be a source of collective shame? Capital punishment as a policy is symptomatic of racial and economic divisions that run through the criminal justice system and undermine rule of law principles. Americans should examine the retention of capital punishment in the 1970s and face a darker yet revealing portrait of American values. A policy so final and iconic yet flawed and dysfunctional casts a shadow over the confidence required in a democratic system of justice.

Today, interracial marriage known in the past as unlawful miscegenation is accepted, legal and common. In 2015, Jim Crow segregation laws are unconstitutional and same sex marriage and the rights of those in LGBT communities are gradually being valorized and defended. These are examples of the social transformations made possible in the realm of public ethics, as a society responsibly considers if a law, policy, custom or practice is contributing to the public good.

Moral revolutions are possible in time. Real practices in everyday life are the place to confront the most serious moral and ethical dilemmas and therein, possibly, uncover the public good. America spends a lot of resources grinding away at capital punishment but the problems with lethal injections could awaken the country to a moral and ethical intersection.

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Debates about capital punishment usually play to the emotions. Contemporary Western culture is saturated with arguments that call for its abolition. Well-meaning Christians only add to the ethical confusion surrounding the debate by calling for abolition to the death penalty in the name of some "higher" Christian ethic.¹⁷ To suggest that the ultimate human crime should not be met with the ultimate punishment at the hands of the civil authorities is not "compassion" as some would have it; rather, it is moral prostitution of the highest order. If a person cannot be made to answer for a capital crime, then everything in the world is arbitrary and nothing is certain. Reducing matters of morality to private elitism, public opinion, or mushy re

Ethics + Religion. Health. Politics + Society. While many European countries urge an ethic of rehabilitation in their criminal justice systems, many jurisdictions in the United States stand firmly in favour of capital punishment for serious crimes. Even a federal jury in Massachusetts, a liberal bastion, recently doled out the death penalty to the sole surviving perpetrator of the Boston marathon bombing. And while the United Kingdom abandoned the death penalty in 1964 "the year of the last executions" nearly half of the British public favours a reintroduction of it (though that figure has been dropping steadily). Source for information on Capital Punishment: Morality, Politics, and Policy: Encyclopedia of Crime and Justice dictionary. Abolition of the death penalty became a matter for political discussion in Europe and America beginning in 1764, when the young Italian jurist Cesare Beccaria (1738"1794) published his little book, *On Crimes and Punishments*. Beccaria's criticism of torture and the death penalty typified the Enlightenment zeal for rational reform of prevailing social practices. Beccaria's alternative to the death penalty was life in prison at hard labor. In short order Catherine of Russia decreed an end to the death penalty, and so did Emperor Leopold in the province of Tuscany in the Austro-Hungarian