The U.S. Criminal Justice System

Capital punishment in the 'land of the free'

Most western democracies have discarded the practice of capital punishment into the annals of history. In 1965, the United Kingdom suspended the death penalty under the Murder (Abolition of Death Penalty) Act, and, in 1998, it abolished the death penalty for all other offences, including treason and piracy with violence; as did Canada, too. Mexico, Australia, New Zealand, South Africa, the European Union and several other countries have abolished the death penalty on grounds that they deem such sentencing measures anathema and out of touch with the principles espoused by their institutions. Legislation barring judicial execution within the European Union is enforced through treaties; e.g. Article 2.2 of the Charter of Fundamental Rights of the European Union: *"No one shall be condemned to the death penalty or executed"* explicitly illustrates it. A beacon of democracy still retains the death penalty—The United States of America.

Felons may be sentenced to death by the U.S. federal government, the military, or else by states which legalize capital punishment. Death sentences prescribed by the armed forces occur occasionally, with the most common being at state level. Statistics reveal that approximately one third of convicts sentenced to death die in the death chamber. The remainder die in custody of natural causes or get off death row, either by proving their innocence or disproving the prosecution in an appellate court, or, by having their death sentence commuted to life imprisonment. Clemency is, relatively speaking, rare. The law makes provisions for five means of execution: (1) hanging; (2) firing squad; (3) electrocution; (4) gas inhalation; (5) lethal injection.

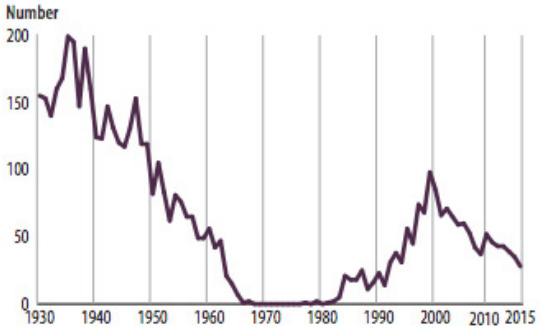
The execution methods which preceded the post-modern age, and still retain currency, are hangings from the gallows and firing squads. Hanging remains in use in the states of Washington and New Hampshire as a secondary option. A moratorium on death by firing squad was enacted in Utah in 2004, and later repealed in 2015 in response to an export ban by the European Union on pharmaceutical drugs used for lethal injections. Before the nineteenth century drew to a close, executions by hanging and firing squad fell out of favour, as alternative methods of 'humane execution' [a dreaded oxymoron] came to the fore. The electric chair owes its creation to a feud between two inventors, Thomas Edison and George Westinghouse, termed the "War of the Currents" for their fierce competition to win lucrative electricity contracts. The focal point in those times was safety. Edison had developed direct current voltage—DC, whereas Westinghouse was an advocate of alternating current voltage—AC. A commission in New York had been contemplating replacing hanging with other forms of execution. Hanging fell out of favour with lawmakers invoking the constitutional eighth amendment not to inflict *"…cruel and unusual punishments"* in keeping with the U.S. Supreme Court's ruling that this amendment applies to the states as much as it does to the federal government. When the noose was too tight around the neck, the head often snapped off, and, when the noose was too loose, the convicted felon would take an agonising long time to die. Death by electrocution was first tested on animals. Cats, dogs, horses and an elephant were sacrificed in the name of science. Thomas Edison was a purveyor of these tests, all carried out on alternating current voltage; not per se because of his views vis-à-vis capital punishment, but, because he sought to discredit AC voltage as too dangerous a current in order to gain control of the market by promoting his system of DC voltage.

On the 6th of August, 1890, the experiments shifted from animals to humans when the state of New York executed William Kemmler for murdering his wife with a hatchet. All those gathered to bear witness of the execution expected the condemned to die by the first jolt; but, he did not, thereby prompting one to yell: *"Great God. He is alive!"* following which someone else yelled: *"Turn on the current!"* soon thereafter. By the second jolt, Kemmler was well and truly dead. His body was so badly burnt, and took so long to cool off, that the press pounced on the novelty with unfavourable coverage. Newspapers characterised Kemmler as the "poor wretch". Edison unsuccessfully tried to capitalise on the furore which ensued in the aftermath of their "botched" execution. A little over a decade later, in 1903, a retired circus elephant baptized Topsy fell prey to the Edison/Westinghouse spat after she was herself publicly slain by electrocution.

William Kemmler would not be the last person to die incinerated on the electric chair. Attempts were made to perfect these executions. States differ as regards the levels of voltage and the timeframes for each sequential jolt, but, the uniform consensus is that the prisoner's head, and calf of one leg, must be shaved to better enable the electrodes to pass through the body. The initial jolt stops the heart and induces unconsciousness, and, as often is the case, the body may heat up to as high as the boiling point of water, the eyeballs melt, the electrical current passing through causes the body to twitch and gyrate uncontrollably, and, it is not unheard of for the condemned to shriek and shout until rendered unconscious. The constitutional validity of electrocution as a means of execution was called into question by concerned lawmakers, thereby inducing a fresh initiative to reform the format. In 1921, the state of Nevada introduced a new method when it decided on chemical asphyxiation. The first execution by lethal gas took place on the 8th of February, 1924 when Gee Jon was put to death for the brutal murder of a rival gang member, Tom Quong Kee. The state of Nevada's first attempt at executing Gee Jon proved unsuccessful after cyanide gas pumped into his cell leaked back out. That setback was overturned by constructing a purpose built airtight gas chamber. For execution by this method, the condemned's arms and legs are strapped to a chair from which a pail of sulphuric acid rests underneath. A long stethoscope is typically affixed to the chest so that a doctor outside the chamber can pronounce death. Once everyone has left the chamber, the room is sealed. It is then left up to the warden to signal to the executioner, who releases crystals of either sodium cyanide or potassium cyanide into the pail. The ensuing effect causes a chemical reaction that releases hydrogen cyanide, which impairs one's physical ability to process blood haemoglobin to harness oxygen. To speed up the process, and ostensibly ease the suffering, the prisoner is instructed to breathe in deeply the hydrocyanic gas. That advice goes mostly unheeded in defiance of the inevitable, in which case, the condemned will take longer to lose consciousness. Before executions are carried out on humans, it is standard practice to test the efficacy of the chemicals on animals. The tests are carried out by isolating small sized animals like cats and rabbits in a cage, placing these onto a chair inside the gas chamber where the condemned would otherwise sit, and performing the executions. In every instance, the animals are rattling in their cage in distress, gasping for breath until they are dead. Death by lethal gas is not in the least instantaneous. The longest recorded death in the gas chamber was of Walter LaGrand in 1999, which took eighteen minutes to draw to a close, wherein he agonisingly choked, gagged, convulsed and heaved in the process. Jimmy Lee Gray, a recidivist child rapist and killer, was prematurely declared dead in 1983, just two minutes into his execution. Gray, however, still showed signs of life, as he sat there helplessly moaning and banging the back of his head against a metal bar. The witnesses were extracted from the viewing room with the execution still ongoing.

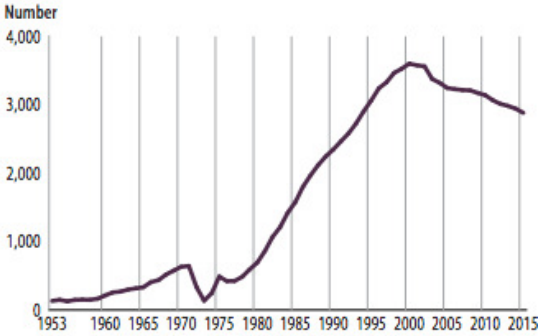
Thus far, the gas chamber has claimed several hundred victims since it was first tried out in 1924. At its peak, eleven states had adopted this method; those being: Arizona, California, Colorado, Maryland, Missouri, Mississippi, New Mexico, North Carolina, Nevada, Oregon and Wyoming. The state of California imposed restrictions on its use in 1994 through a district court, citing the eighth amendment that such practice inflicts cruel and unusual punishment. All but a handful of states retain lethal gas, but, strictly as a secondary option; either in the event that lethal injection cannot be administered, or, upon request by the condemned, forsaking the primary option for the gas chamber. By the late 1950s, the civil rights movement had evolved, which served as the impetus for change in ensuring that all people are equal before the law, irrespective of origin. Whence, America was undergoing a metamorphosis, from racial inequality to parity. By the late 1960s, there was a diminishing desire throughout the federation to execute death row inmates, fuelled in part by the slaying of Dr. Martin Luther king Jr. in 1968.

FIGURE 1
Number of persons executed, 1930–2015



Source: Bureau of Justice Statistics, National Prisoner Statistics Program (NPS-8), 1930–2015.

FIGURE 2
Number of persons under sentence of death, 1953–2015



Source: Bureau of Justice Statistics, National Prisoner Statistics Program (NPS-8), 1953–2015.

In 1972, death chambers were rendered idle throughout America as death row inmates were granted an unexpected reprieve when the ruling of a divided Supreme Court into the landmark case *Furman v. Georgia* (1972) culminated in a de facto moratorium on capital punishment. The case focused on the right to impartial sentencing for all strata of society as regards the imposition of the death penalty. Furman's attorney, Anthony Guy Amsterdam, argued that capital punishment was systematically unfair because its imposition varied from state to state, in violation of the fourteenth amendment which prohibits states to *"…deny to any person within its jurisdiction the equal protection of the laws."* e.g. a person who stood convicted of rape, or kidnapping, could have faced the death penalty in some states, whilst in others, the statute books mandated a term of incarceration. Also addressed in the case was the lack of impartiality on the benches. Were the victim of European heritage, and the felon of African heritage, the felon was statistically more prone to a death sentence. Were the victim of African heritage, and the felon of European heritage, the felon was [more likely] treated with leniency by a judge because of the racial bias and prejudice which permeated the old confederacy. During the deliberations, the Supreme Court Justices each offered divergent opinions. Justice Potter Stewart tackled the inconsistencies of the death sentence, arguing that a lack of rational standards and statutory reforms made its imposition unconstitutional:

"…I simply conclude that the eighth and fourteenth amendments cannot tolerate the inflicting of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed."
~ Potter Stewart

Justices William Joseph Brennan Jr. and Thurgood Marshall both concurred with each other that capital punishment does not deter crime, and has no place among a modern and progressive society, which had since evolved and distanced itself from expressing retribution by lethal means. They summarized in their deliberations that they deemed capital punishment to be cruel and unusual punishment, and would prohibit it entirely:

"…What gives an additional glare of horror to these gloomy circumstances is the consideration that Congress have to ascertain, point out, and determine what kind of punishments shall be inflicted on persons convicted of crimes. They are nowhere restrained from inventing the most cruel and unheard-of punishments and annexing them to crimes; and there is no constitutional check on them, but that racks and gibbets may be amongst the most mild instruments of their discipline."
~ Joseph Brennan Jr.

Justice William Orville Douglas opined that, too frequently has the death penalty been imposed disproportionately on minority groups, and the processes need urgent reform:

"…In these three cases, the death penalty was imposed; one of them for murder, and two for rape. In each, the determination of whether the penalty should be death or a lighter punishment was left by the state, to the discretion of the judge or of the jury. In each of the three cases, the trial was to a jury…I vote to vacate each judgement, believing that the exaction of the death penalty does violate the eighth and fourteenth amendments."
~ William Orville Douglas

Justice Byron Raymond White struck down the death penalty because he doubted that its use met any existing general need for retribution, and as such deemed it redundant:

"…The imposition and execution of the death penalty are obviously cruel in the dictionary sense; but the penalty has not been considered cruel and unusual punishment in the constitutional sense because it was thought justified by the social ends it was deemed to serve. At the moment that it ceases realistically to further these purposes, however, the emerging question is whether its imposition in such circumstances would violate the eighth amendment. It is my view that it would, for its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the state would be patently excessive and cruel and unusual punishment, violative of the eighth amendment."
~ Byron Raymond White

The remaining four judges, Chief Justice Warren Earl Burger, Justice William Hubbs Rehnquist, Justice Lewis Franklin Powell Jr. and Justice Harry Andrew Blackmun (all Nixon appointees) dissented with their peers and voted to retain capital punishment in its unreformed format. The case was voted 5-4 in Furman's favour, whose results had profound implications as it spared the lives of six hundred other felons on death row. None of the judges questioned per se the constitutional validity of capital punishment, since it is referenced in the United States Constitution. However, the majority took the view that a moratorium was necessitated by the processes in which the death sentence was imposed; whether they could be improved by being made rational and objectively reviewable, without discriminating on race, religion, wealth, class, or, social standing.

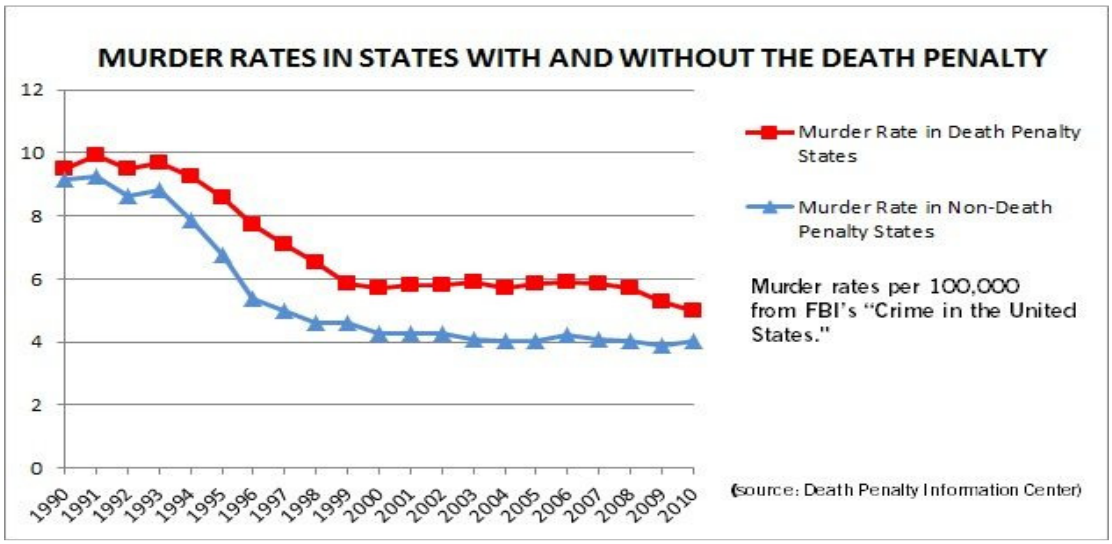
The moratorium on capital punishment did not equate to a total abolition of the death penalty. The Supreme Court made its return conditional on two broad guidelines that each state legislator had to adhere to in order to create their own constitutional capital sentencing scheme. Each scheme had to consist of objective criteria to direct and limit sentencing, subject to appellate review, and, each scheme needed to provide sufficient jury discretion to allow a judge to consider aggravating and mitigating circumstances, such as the character and record of the defendant, before a sentence could be passed. In layman's terms, before a judge could pass sentence, the Supreme Court called for murder cases to be split in two parts, in a so-called bifurcated procedure. So too did it make it incumbent on the states to automatically appeal each and every death sentence to their respective Supreme Courts, and to provide adequate legal counsel to represent whomsoever was on trial, wherever required, and, the states had to enact uniform laws consistent throughout retentionist states as to what crimes warrant the death penalty. Mandatory sentencing and capital punishment for rape were declared unconstitutional.

Following the decree ushered by the Supreme Court of the United States, few doubted that the moratorium would stand the test of time. The majority perceived this standard to be a natural progression from the statistical fall in the number of persons executed. Justice Potter Stewart remarked that the death sentence is *"…cruel and unusual, in the same way that being struck by lightning is cruel and unusual."* State legislators in the old confederacy were at odds with the abolitionist stance. Georgia, Florida, Louisiana, Texas and North Carolina revised their death penalty policies by developing systems in conformity with the Supreme Court. In 1976, five murder cases were submitted on appeal to the Supreme Court: *Gregg v. Georgia*, *Jurek v. Texas*, *Roberts v. Louisiana*, *Proffitt v. Florida* and *Woodson v. North Carolina* (1976). The cases quoted were all decided on the 2nd of July, 1976, in which the lead case, *Gregg v. Georgia*, effectively reinstated the death penalty. Texas and Florida, also, were successful in winning their prosecutions. The Supreme Court was not sufficiently content with the processes that Louisiana and North Carolina had drafted at the time of their appeals; nonetheless, the moratorium had been overturned, thus enabling the resumption of capital punishment.

With capital punishment once again declared constitutional, lawmakers debated in the background about devising new methods in which executions could be standardized. The concept of gassing initially began with toxicologist Dr. Allen McLean Hamilton, who suggested it as a more humane method to hanging or shooting. The firm that built the first octagonal shaped gas chambers in the 1930s was Eaton Metal Products, based in Salt Lake City, Utah. The method picked to replace lethal gas was lethal injection. Lethal injection was invented by Dr. Karl Brandt, who was the personal physician of Adolf Hitler. Nazis pioneered lethal injection to implement their eugenics programme. On the 7th of December, 1982, lethal injection was first tried out on Charlie Brooks Jr. at a prison in Huntsville, Texas. The process usually involves a tripartite classification of three drugs, whereby the first drug administered acts as an anaesthetic that induces unconsciousness. The second drug is typically a muscle relaxant that causes paralysis. The final drug is potassium chloride, which stops the heart by causing cardiac arrest. Some states have adopted a single-drug method instead of three due to drug shortages. Execution by this method works by strapping the condemned to a gurney for restraint, thereafter inserting two intravenous (IV) tubes, one tube in each arm. The intravenous tubes are threaded through an opening in the wall that leads to the anteroom, which is where the executioner is located. Once the tubes are inserted, a saline solution starts to flow into them. At this time, the inmate is granted a chance to make a final statement.

The perception of execution by lethal injection is that it is humane, painless, clinical, though this is, at best, a misconception. The idea behind the concept is not to make it easier for the condemned being killed, but rather, to make it easier for the executioner. Since lethal injection began, in 1982, circa 10% of all executions have been botched. The executioner is typically a correctional officer on the penitentiary's payroll, and is not necessarily medically trained. A licensed medic is tasked with fitting the syringes, inserting the IV tubes and pronouncing the prisoner's death, though most medics who perform these tasks are young and inexperienced practitioners. A three-drug execution process requires the inmate to be injected with a dosage of 5000 mg sodium thiopental for the anaesthetic to work properly. However, due to drug shortages, there have been instances where lower levels of the sleeping drug have been administered. Under such conditions, the condemned inmates were likely to have been awake, aware, anxious of their inevitable fate, and, feeling excruciating pain, without appearing to be suffering. Due to a European-led human rights embargo, the inventory of lethal chemicals in the United States has dwindled, to a point where demand outstrips supply. A dozen states have resorted to use non-FDA (U.S. Food and Drug Administration) approved drugs, either chemicals imported from unsupervised and unapproved factories, or, chemicals sourced in America manufactured by compounding pharmacies, which are not heavily reliant on FDA scrutiny. Such malpractice puts the efficacy of the drugs into question. To cope with the shortage, some states have tried out untested combinations of drugs. Prison officials have gone as far as to refuse to disclose any information regarding the sources, purity and, in some instances, contents of their chemicals by enacting secrecy laws to protect the interests of the pharmacies, citing concerns of threats, intimidation and retribution by anti-death penalty activists. The lack of transparency regarding the changes to execution protocols has spurred many lawsuits by death row inmates, who argue that those practices do not ensure a humane death, and are thus unconstitutional.

Pro-death penalty advocates commonly make the case that capital punishment should be maintained as a permanent fixture because it serves as a deterrent effect; however, that argument is unsubstantiated by statistical evidence. The pattern spanning 1976 to the present day demonstrates that the average homicide rate per 100.000 inhabitants is consistently greater in the retentionist states than what the rate is in abolitionist states. The Southern region, which accounts for the highest proportion of executions, is most dysfunctional, as it consists of the highest murder rate nationwide, whereas the lowest murder rate is traditionally found in the North-East region, in the abolitionist territory.



No justice system is infallible, nor is prosecutorial misconduct unheard of anywhere, or, for that matter, prosecution teams committing perjury to obtain a desired outcome. Law enforcement agents have vested interests in winning trials for career progression. Prosecutors sometimes withhold evidence. Police officers sometimes falsify evidence. Witnesses sometimes give false testimonies. Miscarriages of justice sometimes occur. According to a study published in 2014 by the University of Michigan, in conjunction with legal experts and statisticians from Pennsylvania, at least 4.1% of all defendants sentenced to die are innocent of the crimes that they are purported to have committed. The presumption of innocence places the burden of proof on the complainant to prove guilt in a court of law, above and beyond, any and all, reasonable doubt. Under a fair and valuable justice system, the defendant's due process rights may never be violated, and the defendant must be presumed innocent until otherwise proven guilty. Evidently in America, these processes are inconsistently upheld, and, at times, they are arbitrary. The worst possible perverted outcome under a capital sentencing system is to execute an innocent person. In such a scenario, the executioner himself becomes the murderer.