

ONE WAY OR ANOTHER THE DEATH PENALTY WILL BE ABOLISHED, BUT ONLY AFTER THE PUBLIC NO LONGER HAS CONFIDENCE IN ITS USE

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There are current indicators that the death penalty is losing much of its allure in the United States. In her article, “Abolishing the Death Penalty,” Professor Knake points out that since the Supreme Court reinstated the death penalty in 1976,¹ its role in the American criminal justice system has diminished steadily:

Nineteen [states] prohibit it by statute, or in their constitutions, with a gubernatorial moratorium in an additional three, and state court bans in several others. The number of death sentences decreased dramatically over the past two decades, down to just 39 in 2017 compared to 295 in 1998. Only eight states engaged in executions in 2017. Harris County, Texas, once the leading jurisdiction for capital punishment by a substantial margin, imposed no death sentences and engaged in no executions in 2017.²

During roughly the same period that these things were happening, more than 150 innocent individuals sentenced to death have been exonerated. Although Professor Knake concedes that the Supreme Court may have lost some of its appetite for capital punishment, she

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1. See generally *Gregg v. Georgia*, 428 U.S. 153 (1976).

2. Renee Knake, *Abolishing Death*, 13 DUKE J. CONST. L. & PUB. POL’Y 1, 1–2 (2018) (footnotes omitted).

concludes that “permanent abolishment is unlikely to occur there.”³ Consequently, Professor Knake suggests this may be a good time to consider a constitutional amendment to abolish capital punishment. I disagree.

Relying on many of the same factors as Professor Knake, Justice Breyer concluded in 2015 that it was, “highly likely that the death penalty violates the Eighth Amendment.”⁴ Other judges agree.⁵ This represents a small but significant movement toward the inevitable conclusion that the death penalty has “cease[d] to be a credible deterrent or measurably to contribute to any other end of punishment in the criminal justice system.”⁶ At this point, “we are left with a judicial responsibility.”⁷

The political and cultural obstacles to amending the Constitution to abolish the death penalty are likely insurmountable. On the other hand, based on the principles underlying the Supreme Court’s Eighth Amendment jurisprudence, a successful litigation campaign to abolish the death penalty is imaginable. In the short term, however, whether one’s preferred abolitionist route is to amend the Constitution or to litigate in the Supreme Court, the prerequisite for either to be successful is continued erosion of public confidence in the death penalty.

I. THE CURRENT CULTURAL AND POLITICAL DIVISIONS IN THE COUNTRY MAKE A CONSTITUTIONAL AMENDMENT TO ABOLISH THE DEATH PENALTY UNIMAGINABLE

One route to amend the Constitution to abolish the death penalty involves convincing two-thirds of both houses of the United States Congress to pass the amendment and subsequently three-fourths of the

3. *Id.* at 2.

4. *Glossip v. Gross*, 135 S. Ct. 2726, 2755 (2015) (Breyer, J., dissenting). Justice Ginsberg joined Justice Breyer’s dissent. *Id.*

5. See *Jones v. Chappell*, 31 F. Supp. 3d 1050 (C.D.C. 2014), *rev’d sub nom.* *Jones v. Davis*, 806 F.3d 538, 550 (9th Cir. 2015) (Because of excessive delays, the death penalty has become arbitrary and serves neither a deterrent nor a retributive purpose); *United States v. Quinones*, 205 F. Supp. 2d 256, 268 (S.D.N.Y. 2002) (federal death penalty unconstitutional under the Due Process clause of the 5th Amendment because of an unacceptable risk of executing an innocent person), *rev’d* 313 F.3d 49 (2d Cir. 2002) (“In sum, if the well-settled law on this issue is to change, that is a change that only the Supreme Court is authorized to make.”). See also *State v. Santiago*, 122 A.3d 1 (Conn. 2015) (death penalty declared unconstitutional under state constitution for death sentences not affected by the legislature’s prospective repeal of capital punishment).

6. *Furman*, 408 U.S. at 311 (White, J., concurring).

7. *Glossip*, 135 S. Ct. at 2776.

state legislatures to ratify it. That kind of Herculean effort would be a Hail Mary pass, even under the best of political circumstances. Today, it is inconceivable.

Professor Knake describes the failure of Representative Henry B. Gonzalez, Democrat of Texas, to get the House of Representatives even to consider an amendment to abolish the death penalty in 1987, 1990, 1992, 1993, and 1995, when his own political party controlled the House of Representatives.⁸ Nothing suggests that, in the current more polarized political environment, there is any reason to hope such an effort would fare better; the contrary undoubtedly is true. Moreover, even if the Congress passed the necessary legislation to begin the process, getting three-quarters of state legislatures to ratify the amendment would be an equally long shot.

Further complicating the amendment process are the strange bedfellows that the politics of the death penalty produce. For example, former President Bill Clinton suspended his campaign for the presidency in 1992 to return to Arkansas to demonstrate his support for the death penalty by presiding over the execution of an inmate who was mentally disabled.⁹ More recently, although California is considered one of the most liberal states in the country, its voters repeatedly have defeated ballot initiatives to abolish the death penalty, the last time in November 2016; in that same election, voters also called on the state to speed up executions.¹⁰ On the other hand, in 2015, in one of the country's most conservative states, the Nebraska legislature voted to repeal its death penalty statute over the veto of the state's

8. Democrats controlled the House of Representatives from 1955 through 1995 (84th–103rd Congress).

9. See generally Peter Applebome, *THE 1992 CAMPAIGN: Death Penalty; Arkansas Execution Raises Questions on Governor's Politics*, N.Y. TIMES (Jan. 25, 1992), <https://www.nytimes.com/1992/01/25/us/1992-campaign-death-penalty-arkansas-execution-raises-questions-governor-s.html>.

10. The vote was 53% against the initiative to abolish the death penalty and 48% in favor. *California Proposition 62, Repeal of the Death Penalty (2016)*, BALLOTEDIA, [https://ballotpedia.org/California_Proposition_62,_Repeal_of_the_Death_Penalty_\(2016\)](https://ballotpedia.org/California_Proposition_62,_Repeal_of_the_Death_Penalty_(2016)) (last visited April 11, 2018). The initiative to expedite executions passed 51.13% in favor and 48.8% against. *California Proposition 66, Death Penalty Procedures (2016)*, BALLOTEDIA, [https://ballotpedia.org/California_Proposition_66,_Death_Penalty_Procedures_\(2016\)](https://ballotpedia.org/California_Proposition_66,_Death_Penalty_Procedures_(2016)) (last visited April 11, 2018). At the same time, however, California, which has by far the greatest number of offenders on death row (746), has not executed a prisoner since January 2006. *Facts About the Death Penalty*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/documents/FactSheet.pdf> (last visited April 9, 2018) [hereinafter "DPIC"].

governor.¹¹ In response, supporters of the death penalty started a successful petition drive that suspended the repeal and, in the November 2016 election, almost 61% of voters rejected the repeal measure.¹²

These election results, like opinion polls, reflect only voters' abstract views of the death penalty.¹³ Such apparently strong moral support for the death penalty would be an obstacle to any political effort to amend the Constitution. However, such support would be less relevant in a legal challenge to the death penalty, where actual *use* of the punishment would be the focus. In the last decade, there has been a significant decrease in the use of capital punishment; juries have less frequently sentenced offenders to death and states have less frequently carried out executions. As Justice Breyer has noted, "even in many States most associated with the death penalty, remarkable shifts have occurred."¹⁴ Equally important, "the direction of change is consistent."¹⁵

The other route for an amendment to abolish the death penalty that Professor Knake mentions, a constitutional convention called by two-thirds of the states, while perhaps politically more feasible, is by magnitudes more problematic. Such a gathering more likely would be a vehicle to undermine other more important constitutional values than it would be a viable vehicle to abolish the death penalty. Given the current anemic state of the death penalty, risking an amendment to change the basis for American citizenship, for example, is far too high a price to pay for a mere chance to abolish the death penalty. Moreover, even if the convention adopted an amendment to abolish the death penalty, three-fourths of the states still would have to ratify it. Such a dramatic *political* turnaround from where we are today would be biblical.

11. See generally *Nebraska Death Penalty Repeal, Referendum 426 (2016)*, BALLOTPEdia, [https://ballotpedia.org/Nebraska_Death_Penalty_Repeal,_Referendum_426_\(2016\)](https://ballotpedia.org/Nebraska_Death_Penalty_Repeal,_Referendum_426_(2016)) (last visited April 11, 2018).

12. *Id.*

13. Opinion polls consistently show high public support for the death penalty, even in states that have abolished the death penalty. See *Public Support, Limiting the Death Penalty*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/part-ii-history-death-penalty> (last visited April 11, 2018). In 2004, however, public support appeared to reach an all-time low. According to one poll, only 55% of Americans believed the death penalty was implemented fairly and only 51% believed it deterred crime. *Id.* Although those numbers reflect an erosion of support for the death penalty, the erosion is not sufficient to adopt a constitutional amendment to abolish it.

14. *Glossip v. Gross*, 135 S. Ct. 2726, 2775 (2015).

15. *Id.*

II. “WHEN EXAMINED BY THE PRINCIPLES APPLICABLE UNDER THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE, DEATH STANDS CONDEMNED AS FATALLY OFFENSIVE TO HUMAN DIGNITY.”¹⁶

In 1972, Justice William Brennan concluded that the death penalty was “cruel and unusual” punishment in all circumstances, “and the States may no longer inflict it as punishment for crimes. Rather than kill an arbitrary handful of criminals each year, the States will confine them in prison.”¹⁷ The only other Justice to agree with this conclusion was Thurgood Marshall. Nevertheless, a majority of the Court agreed that, “the basic concept underlying the [“cruel and unusual” clause of the 8th Amendment] is nothing less than the dignity of man.”¹⁸

Among the principles inherent in the “cruel and unusual” Clause is that “a severe punishment must not be unacceptable to contemporary society.”¹⁹ “The question under this principle . . . is whether there are objective indicators from which a court could conclude that contemporary society considers a severe punishment unacceptable.”²⁰ Based on that test, Justice Brennan thought contemporary American society already had rejected the death penalty as unacceptable. Justice Marshall thought that would be evident only if the public actually knew how the punishment was administered; most people did not.

Justice Brennan suggested the approach to determining when the society found a punishment unacceptable: “the judicial task is to review the history of a challenged punishment and to examine society’s present practices with respect to its use.”²¹ He continued, “[l]egislative authorization, of course, does not establish acceptance. The acceptability of a severe punishment is measured not by its availability, . . . but by its use.”²² By that measure, even in 1972, the history of our use of the death penalty was one of “successive restriction:”

What was once a common punishment has become, in the context of a continuing moral debate, increasingly rare. The evolution of this punishment evidences not that it is an inevitable part of the American scene, but that it has proved progressively more

16. *Furman v. Georgia*, 408 U.S. 238, 306 (1972) (Brennan, J., concurring).

17. *Id.* at 305.

18. *Id.* at 270.

19. *Id.* at 277.

20. *Id.* at 278.

21. *Id.* at 278–79.

22. *Id.* at 279.

troublesome to the national conscience. The result of this movement is our current system of administering the punishment, under which death sentences are rarely imposed and death is even more rarely inflicted²³

Justice Brennan concluded:

The objective indicator of society's view of an unusually severe punishment is what society does with it, and today society will inflict death upon only a small sample of the eligible criminals. Rejection could hardly be more complete without becoming absolute. At the very least, I must conclude that contemporary society views this punishment with substantial doubt.²⁴

After more than forty years of additional history, this successive restriction of the death penalty has continued. In 2015, Justice Breyer noted not only the diminished use of the death penalty, but also the “consistency of the direction of the change.”²⁵

a. Death Sentences.

After 1976, when the Supreme Court set out the circumstances under which imposition of the death penalty was constitutional, the number of death sentences steadily climbed. In 1977, 137 people were sentenced to death. “Between 1986 and 1999, 286 persons on average were sentenced to death each year.”²⁶ After 1999, “the numbers began to decline, and they have declined rapidly ever since.”²⁷ By 2014, “just 73 persons were sentenced to death.”²⁸ According to the Center for Death Penalty Information, in the three years since Justice Breyer's dissent in *Glossip*, the number of death sentences has continued to decline: In 2015, there were 49 death sentences; in 2016, there were 31; in 2017, the number increased slightly to 39, but only a few counties within a few states were responsible for all of those.²⁹

b. Executions.

Justice Breyer found the same downward trend for executions.³⁰ In 1999, there were 98 executions; in 2014, there were only 35. In 2014,

23. *Id.* at 299.

24. *Id.* at 300.

25. *Glossip v. Gross*, 135 S. Ct. 2726, 2774 (2015).

26. *Id.* at 2773.

27. *Id.*

28. *Id.*

29. *Facts About the Death Penalty*, *supra* note 10.

30. *Glossip*, 135 S. Ct. at 2773.

“[o]f the 20 States that [had] conducted at least one execution in the past eight years, 9 [had] conducted fewer than five in that time, making an execution in those states a fairly rare event.”³¹ Of the 11 states that executed more than 5 persons in the last eight years, “three of those states (Texas, Missouri, and Florida) accounted for 80% of the executions nationwide (28 of the 35) in 2014.”³²

Since Justice Breyer’s dissent, the number of executions has continued to decline.³³ In 2015, there were 28.³⁴ In 2016, there were only 20.³⁵ In 2017, however, there was a slight increase to 23, but more than half of those were in three states (Texas, Arkansas, and Florida).³⁶ As of March 27, 2018, there have been 7 executions; four of them in Texas and all of them confined to 4 states (Texas, Florida, Alabama, and Georgia).³⁷

c. Errors and Innocence.

Not only are there fewer and fewer death sentences and executions, but more and more inmates are being removed from death row alive, because of errors that resulted in their convictions or sentences being vacated or commuted or because they were innocent. In 2014, according to Justice Breyer, of the 8,466 inmates on death row “at some point between 1973 and 2013, 16% were executed, 42% had their convictions or sentences overturned or commuted, and 6% died by other causes; the remainder (35%) are still on death row.”³⁸ The Death Penalty Information Center reports that 161 innocent people have been released from death row between 1973 and March 28, 2018.³⁹ These individuals had been on death row in 28 different states.

d. State-level data.

According to Justice Breyer, “the number of active death penalty States has fallen dramatically.”⁴⁰ There were 41 states that authorized the death penalty when *Furman* was decided in 1972; only nine states

31. *Id.*

32. *Id.*

33. *Facts About the Death Penalty*, supra note 10.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Glossip*, 135 S. Ct. at 2768.

39. *Facts About the Death Penalty*, supra note 10.

40. *Glossip*, 135 S. Ct. at 2773.

had abolished it. In 2014, “19 states [had] abolished the death penalty (along with the District of Columbia), although some did so only prospectively.”⁴¹ However, in 11 of the states that retained the death penalty, “no execution has taken place for more than eight years,” including in California and North Carolina.⁴²

In addition to its confinement to a few states, the death penalty also is confined geographically within those states. Justice Breyer pointed out that “between 1973 and 1997, 66 of America’s 3,143 counties accounted for approximately 50% of all death sentences imposed.”⁴³ Beginning in the early 2000s, the death penalty was being actively used in an increasingly small number of counties; “between 2004 and 2009, only 35 counties imposed 5 or more death sentences, *i.e.*, approximately one a year.”⁴⁴ Between 2010 and June of 2015, this number had dropped to 15.⁴⁵ Justice Breyer concluded, “the number of active death penalty counties is small and getting smaller.”⁴⁶ He wrote:

In sum, if we look to states, in more than 60% there is effectively no death penalty, in an additional 18% an execution is rare and unusual, and in 6%, *i.e.*, three States, account for 80% of all executions. And if we look to counties, in 86% there is effectively no death penalty. It seems fair to say that it is now unusual to find capital punishment in the United States, at least when we consider the nation as a whole.⁴⁷

III. AT THIS POINT, THE STRATEGY FOR ABOLISHING THE DEATH PENALTY BY AMENDMENT OR LITIGATION SHOULD BE THE SAME: CONTINUE EFFORTS THAT JUSTIFIABLY UNDERMINE PUBLIC CONFIDENCE IN CAPITAL PUNISHMENT.

In *Furman*, although Justice Thurgood Marshall agreed with Justice Brennan that the death penalty was unconstitutional, he noted that Americans knew almost nothing about how the punishment was implemented. Thus, “the question with which we must deal is not

41. *Id.*

42. In fact, neither North Carolina nor California has carried out an execution since 2006. See *Facts About the Death Penalty*, *supra* note 10.

43. *Glossip*, 135 S. Ct. at 2774. According to one study, in 2011, counties with only 10% of the nation’s population accounted for 43% of its death sentences. James S. Liebman & Peter Clarke, *Minority Practice, Majority’s Burden: The Death Penalty Today*, 9 OHIO ST. J. CRIM. LAW 255, 264–65 (2011).

44. *Glossip*, 135 S. Ct. at 2774.

45. *Id.*

46. *Id.*

47. *Id.*

whether a substantial of American citizens would today, if polled, opine that capital punishment is barbarously cruel, but whether they would find it to be so in the light of all information presently available.”⁴⁸ Marshall believed that if the available facts were known, “the average citizen would . . . find it shocking to his conscience and sense of justice.”⁴⁹ In the years since 1972, the public has learned much of the information that Marshall referenced.⁵⁰ The decline in our use of the death penalty vindicates Marshall’s judgment: “even if capital punishment is not excessive, it nonetheless violates the Eight Amendment because it is morally unacceptable to the people of the United States at this time in their history.”⁵¹

Justice Breyer wrote in *Glossip* that, “[t]he circumstances and the evidence of the death penalty’s application have changed rapidly since [1976, when the Court found capital punishment constitutional].”⁵² Therefore, he concluded, “it is now time to reopen the question.”⁵³ The Court turned down an opportunity to do so this Term.⁵⁴ But, unless there is a radical departure from its current Eight Amendment jurisprudence,⁵⁵ it is inevitable that the Court will revisit the question. In the meantime, abolitionists should continue to inform the public about how the death penalty actually works.⁵⁶

48. *Furman v. Georgia*, 408 U.S. 238, 362 (1972) (Marshall, J., concurring).

49. *Id.* at 369.

50. Among the information the public needed to know, Marshall included: “capital punishment is imposed discriminatorily against certain identifiable classes of people; there is evidence that innocent people have been executed before their innocence can be proved; and the death penalty wreaked havoc with our entire criminal justice system.” *Id.* at 364. See generally BRANDON GARRETT, *END OF ITS ROPE: HOW KILLING THE DEATH PENALTY CAN REVIVE CRIMINAL JUSTICE* (2017).

51. *Furman*, 408 U.S. at 360.

52. *Glossip*, 135 S. Ct. at 2755.

53. *Id.*

54. *Hidalgo v. Arizona*, 138 S. Ct. 1054, 1054 (2018).

55. See generally Bidish J. Sarma, *How Hall v. Florida Transforms the Supreme Court’s Eight Amendment Evolving Standards of Decency Analysis*, 62 UCLA L. REV. DISC. 186 (2014).

56. In 1997, the American Bar Association (ABA) adopted a Resolution calling for a moratorium on the death penalty, based on the premise of Justice Marshall’s argument that public education about the flaws in the system of capital punishment would lead to public rejection of the death penalty. *Death Penalty Moratorium Resolution*, AM. BAR ASS’N, https://www.americanbar.org/groups/committees/death_penalty_representation/resources/dp-policy/moratorium-1997.html (1997).

Subsequently, the ABA appointed a Death Penalty Moratorium Implementation Project that called on states to examine their systems of capital punishment pursuant to a protocol, developed by the ABA Section of Individual Rights & Responsibilities for that purpose. AM. BAR ASS’N, *Death Without Justice: A Guide for Examining the Administration of the Death Penalty in the United States*, 63 Ohio St. L. J. 487-548 (2002).

The author was directly involved in the foregoing activities as chair of the ABA Section of Individual Rights & Responsibilities (1999-2000) and as the first chair of the Death Penalty Implementation Project (2001-2006). See *The Innocence Protection Act of 2000: Hearing on H.R. 4167 Before the H. Comm. On the Judiciary*, 106th Cong. (2000) (statement of James E. Coleman, Jr. Chair, Section of Individual Rights and Responsibilities, American Bar Association), <http://www.spectacle.org/0700/counsel.html>.