

Should the United States abolish the death penalty?

What they said...

'We owe it to the victims and their families to carry forward the sentence imposed by our justice system'

United States Attorney General William Barr

'The death penalty...has no public safety benefit'

American Civil Liberties Union

On January 16, 2021, the last federal execution authorised by the Trump administration was completed.

Over the preceding six months, the United States federal government had executed a further twelve prisoners convicted of capital offences.

<https://www.vox.com/2021/1/16/22234447/dustin-higgs-execution-death-penalty-trump-administration>

It has been noted that this is the highest number of federal executions since 1896 and more than the seven executions conducted in 2020 by all the 28 American states that still apply the death penalty. <https://edition.cnn.com/2020/12/17/politics/federal-death-penalty-2020-trnd/index.html>

On July 25, 2020, the United States Department of Justice announced that the Trump administration would resume capital punishment after 'a nearly two-decade lapse'. Attorney General William Barr stated, 'The Justice Department upholds the rule of law—and we owe it to the victims and their families to carry forward the sentence imposed by our justice system.'<https://www.justice.gov/opa/pr/federal-government-resume-capital-punishment-after-nearly-two-decade-lapse>

Robert Dunham of the Death Penalty Information Center has explained that opponents of the death penalty have been critical of these executions as 'out of step with the historical practices of previous presidents...[and] out of step with today's state practices' as capital punishment has been in decline across the United States. <https://www.theguardian.com/us-news/2020/dec/15/trump-administration-us-death-penalty-executions>

Background information

The information below is abbreviated and re-organised from the Wikipedia entry titled 'Capital punishment in the United States'. The full entry can be accessed at https://en.wikipedia.org/wiki/Capital_punishment_in_the_United_States

The death penalty (otherwise known as capital punishment) is a legal penalty in the United States, currently used by 28 states, American Samoa, the federal government, and the military.

Its existence can be traced to the beginning of the American colonies. Along with Japan, Taiwan, and Singapore, the United States is one of four advanced democracies and the only Western nation that applies the death penalty regularly. It is one of 35 countries worldwide applying it and was the first to develop lethal injection as a method of execution, which has

since been adopted by five other countries. It is common practice worldwide for the condemned to be administered sedatives prior to execution, regardless of the method used.

Early history of the death penalty in the United States

The first recorded death sentence in the British North American colonies was carried out in 1608 on Captain George Kendall, who was executed by firing squad spying on behalf of the Spanish government. Executions in colonial America were also carried out by hanging. The Bill of Rights adopted in 1789 included the Eighth Amendment which prohibited cruel and unusual punishment. The Fifth Amendment was drafted with language implying a possible use of the death penalty, requiring a grand jury indictment for "capital crime" and a due process of law for deprivation of 'life' by the government. The Fourteenth Amendment adopted in 1868 also requires a due process of law for deprivation of life by any states.

The abolitionist movement

Three states abolished the death penalty for murder during the 19th century: Michigan (which has never executed a prisoner since achieving statehood), in 1847, Wisconsin, in 1853 and Maine, in 1887. Rhode Island is also a state with a long abolitionist background, having repealed the death penalty in 1852, though it was theoretically available for murder committed by a prisoner between 1872 and 1984.

Executions for various crimes, especially murder and rape, occurred from the creation of the United States up to the beginning of the 1960s. Until then, 'save for a few mavericks, no one gave any credence to the possibility of ending the death penalty by judicial interpretation of constitutional law', according to abolitionist Hugo Bedau, however, a pattern of abolition continued to grow.

Minnesota had abolished the death in 1911, Vermont in 1964, Iowa and West Virginia in 1965, and North Dakota in 1973. Hawaii abolished the death penalty in 1948 and Alaska in 1957, both before their statehood. Puerto Rico repealed it in 1929 and the District of Columbia in 1981. Arizona and Oregon abolished the death penalty by popular vote in 1916 and 1964 respectively, but both reinstated it, again by popular vote, some years later; Arizona reinstated the death penalty in 1918 and Oregon in 1978. In Oregon, the measure reinstating the death penalty was overturned by the Oregon Supreme Court in 1981, but Oregon voters again reinstated the death penalty in 1984. Puerto Rico and Michigan are the only two U.S. jurisdictions to have explicitly prohibited capital punishment in their constitutions: in 1952 and 1964, respectively.

Capital punishment was used by only 5 of 50 states in 2020. They were Alabama, Georgia, Missouri, Tennessee, and Texas.

The Supreme Court and challenges to the death penalty

There were no executions in the United States between 1967 and 1977. In 1972, the United States Supreme Court struck down capital punishment statutes in *Furman v. Georgia*, reducing all death sentences pending at the time to life imprisonment. This was in response to the claim that the 'arbitrary' nature of the application of the death penalty made it a 'cruel and unusual' punishment, in violation of the Eighth Amendment to the United States constitution.

Subsequently, many states passed new death penalty statutes, and the court affirmed the legality of capital punishment in the 1976 case *Gregg v. Georgia*. Since then, more than 7,800 defendants have been sentenced to death; of these, approximately 1,500 have been executed.

A total of 170 who were sentenced to death since 1972 were exonerated. As of December 17, 2019, 2,656 convicts are still on death row.

Federal executions under the Trump administration

The Trump administration's Department of Justice announced its plans to resume executions for federal crimes in 2019. On July 14, 2020, Daniel Lewis Lee became the first inmate executed by the federal government since 2003. There are currently 51 inmates on federal death row. Thirteen federal death row inmates have been executed since federal executions resumed in July 2020.

Internet information

The Death Penalty Information Center is one of the primary sources available on the operation of capital punishment in the United States.

Its homepage can be accessed at <https://deathpenaltyinfo.org/>

On January 17, 2021, BBC News published a report titled, 'Dustin Higgs: Final execution of Trump presidency is carried out'

The article refers to the last federal execution to occur during Donald Trump's presidency and gives some background on the issue.

The full text can be accessed at <https://www.bbc.com/news/world-us-canada-55687279>

On January 16, 2021, CNN Politics published a report titled 'Supreme Court's liberal justices lash out at unprecedented 'rush' of executions as Trump leaves office'. It deals with the opposition of liberal judges on the United States Supreme Court to the execution of federal thirteen prisons over six months, including three immediately before President Trump left office.

The full text can be accessed at <https://edition.cnn.com/2021/01/16/politics/trump-federal-executions-supreme-court-justices/index.html>

On December 22, 2020, the New York Magazine supplement, *Intelligencer*, published an analysis titled 'Will Biden Use His Powers to Crush the Death Penalty?' which examines the evolution of president-elect Joe Biden's views on the death penalty.

The full text can be accessed at <https://nymag.com/intelligencer/2020/12/will-biden-use-his-powers-to-crush-the-death-penalty.html>

On December 19, 2020, *The Conversation* published a comment and analysis titled 'When families of murder victims speak at death penalty trials, their anguish may make sentencing less fair' The article is written by Austin Sarat, Associate Provost and Associate Dean of the Faculty and Cromwell Professor of Jurisprudence and Political Science, Amherst College. Sarat argues that victim testimony introduces aggravating factors of which the convicted criminal will have been unaware at the time the crime was committed.

The full text can be accessed at <https://theconversation.com/when-families-of-murder-victims-speak-at-death-penalty-trials-their-anguish-may-make-sentencing-less-fair-146387>

On December 17, 2020, CNN Politics published an analysis and commentary on the United States' federal use of the death penalty in the five months to December 2020. The piece is titled 'The US government has executed 10 people this year – the most since 1896'
<https://edition.cnn.com/2020/12/17/politics/federal-death-penalty-2020-trnd/index.html>

On August 27, 2020, The Navajo Times published a report titled 'Father of 9-year-old: "I have waited 19 years to get justice for my daughter"'. The report quoted the views of the father of a nine-year-old child whose convicted murderer was one of those whose execution was approved by the Trump administration.
<https://navajotimes.com/reznews/father-of-9-year-old-i-have-waited-19-years-to-get-justice-for-my-daughter/>

On December 12, 2020, USA Today published an opinion piece by Jennifer Lackey titled 'My college student's transformation provides best argument for abolishing death penalty'. The piece supplies a detailed personal example as an argument against capital punishment. The full text can be accessed at
<https://www.usatoday.com/story/opinion/policing/2020/12/12/my-students-transformation-provides-best-argument-against-death-penalty/6514937002/>

The American Civil Liberties Union opposes the death penalty. Its detailed case opposing capital punishment can be accessed at <https://www.aclu.org/other/case-against-death-penalty>

The United Nations is opposed to the death penalty. Its arguments against the punishment can be accessed at
<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22208&LangID=E#:~:text=%E2%80%9CIf%20you%20are%20poor%2C%20the,from%20lower%20socio%20Deconomic%20groups.>

On November 30, 2020, Slate published a comment by Austin Sarat titled 'Trump's Approval of Hanging and Firing Squads Is a National Embarrassment'. The article refers to the Trump administration's approval of a variety of methods of capital punishment in the event that lethal injections cannot be proceeded with. The full text of the article can be accessed at <https://slate.com/news-and-politics/2020/11/trump-approves-hanging-firing-squads-executions.html>

On October 2, 2020, The American Jesuit Review published an article detailing the ruling of Pope Francis, the leader of the Catholic Church, who has determined against the death penalty in his encyclical titled 'Fratelli Tutti'. The full text can be accessed at <https://www.americamagazine.org/politics-society/2020/10/04/pope-francis-closes-door-death-penalty-fratelli-tutti>

On July 27, 2020, Verdict (Legal analysis and commentary from Justia) published an analysis by Sherry F Colb, C.S. Wong Professor of Law at Cornell Law School. The analysis is titled 'Narrow Debate about the Death Penalty'. It critically examines several of the rationales offered for capital punishment. The full text can be accessed at <https://verdict.justia.com/2020/07/27/narrow-debate-about-the-death-penalty>

On March 11, 2020, the American Bar Association published a report titled ‘Several States Consider Repealing or Reforming Death Penalty Laws’ which detailed the position of some American states considering altering their position on the death penalty.

The full text can be accessed at

https://www.americanbar.org/groups/committees/death_penalty_representation/project_press/2020/spring/state-repeal-efforts-2020/

In 2007, The Quarterly Journal of Ideology published a paper titled ‘A Lockean Defense of the Death Penalty: Some Timely Observations’ which examined some of the philosophical justifications offered for the death penalty.

The full text can be accessed at

https://www.lsus.edu/Documents/Offices%20and%20Services/CommunityOutreach/JournalOfIdeology/lockean%20defense_delisi_roark.pdf

On September 20, 2002, The Orlando Sentinel published a report titled ‘Judge Tells Killer he “Forfeited” Right to Life’ in which a judge is quoted justifying the basis on which he had passed a capital sentence.

The full text of the article can be accessed at <https://www.orlandosentinel.com/news/os-xpm-2002-09-20-0209200385-story.html>

On March 30, 2001, National Review published an opinion piece titled ‘More Executions, Less Escapes’ which offered a defence of capital punishment as a means of contributing to community safety.

The full text can be accessed at <https://www.nationalreview.com/2001/03/more-executions-less-escapes-deroy-murdock/>

In 1986, The Harvard Law Review Association, published a briefing paper by John M. Olin Professor of Jurisprudence and Public Policy, Fordham University. The paper is titled ‘The Ultimate Punishment: A Defense’. Professor Olin gives a detailed defence of the death penalty.

The full text can be accessed at

<https://www.pbs.org/wgbh/pages/frontline/angel/procon/haagarticle.html>

Arguments in favour of abolishing the death penalty

1. The death penalty undermines respect for life

Opponents of the death penalty argue that it is morally unacceptable for the state to take the life of someone convicted of murder.

Those who condemn capital punishment maintain that it is a grievous offence to take the life of another human being and that this remains the case whether that person dies at the hands of a random fellow citizen or a state-appointed executioner. Deliberately taking the life of another is claimed to be the grossest violation of that person’s rights as a human being; their existence has been stripped from them without their consent. It is claimed that when the state does this respect for life is diminished and society is brutalized. This position has been put by members of all religious persuasions and by agnostics, humanists, and atheists.

The American Civil Liberties Union (ACLU) argues, ‘An execution is a violent public spectacle of official homicide, and one that endorses killing to solve social problems – the worst possible example to set for the citizenry, and especially children. Governments worldwide have often attempted to justify their lethal fury by extolling the purported benefits that such killing would bring to the rest of society. The benefits of capital punishment are illusory, but the bloodshed and the resulting destruction of community decency are real.’

<https://www.aclu.org/other/case-against-death-penalty>

The ACLU has further stated, ‘When the government metes out vengeance disguised as justice, it becomes complicit with killers in devaluing human life and human dignity. In civilized society, we reject the principle of literally doing to criminals what they do to their victims: The penalty for rape cannot be rape, or for arson, the burning down of the arsonist's house. We should not, therefore, punish the murderer with death.’

<https://www.aclu.org/other/death-penalty-questions-and-answers>

On September 20, 2020, the newspaper This is Reno published a comment by Rabbi Benjamin Zober in response to the United States recent resumption of the death penalty at the federal level. Rabbi Zober stated, “Thou shalt not murder.” (Ex. 20:13) It is so simple, and yet is misinterpreted, misunderstood, and misapplied. Murder is calculated, unjustified and intentional taking of life. When we, under the supposed color of law, deliberate, decide, and plan the purposeful extinguishing of human life, we commit murder. The death penalty is murder.

The federal government’s recent rush to executions is a grim and heart-wrenching example. Despite the outcry of over 1,000 faith leaders, with blatant disregard for the rule of law and shameful indifference to the calls of victims’ family members and loved ones opposing the execution, the administration charged forward claiming “justice.”

<https://thisisreno.com/2020/09/the-death-penalty-is-immoral-it-is-murder-opinion/>

Rabbi Zober concluded, ‘Every life is sacred and deserves dignity. When one life is devalued, all are devalued. There is a world in every person, every life — perhaps the world of someone who committed a crime, but nonetheless the world of a father or a son, a mother or daughter, sister or brother, or friend. “Anyone who destroys a life is considered by Scripture to have destroyed an entire world; and anyone who saves a life is as if he saved an entire world.” (Mishnah Sanhedrin 4:5)’ <https://thisisreno.com/2020/09/the-death-penalty-is-immoral-it-is-murder-opinion/>

On October 4, 2020, the head of the Catholic Church, Pope Francis, published a new encyclical ‘Fratelli Tutti’ which declares the Church’s opposition to the death penalty. The Pope stated, “There can be no stepping back from this position. Today we state clearly that “the death penalty is inadmissible” and the Church is firmly committed to calling for its abolition worldwide...’

In “Fratelli Tutti,” the Pope grounds his opposition to capital punishment in mercy and in opposition to revenge. The Pope states, ‘Fear and resentment can easily lead to viewing punishment in a vindictive and even cruel way, rather than as part of a process of healing and reintegration into society... Let us keep in mind that ‘not even a murderer loses his personal dignity. The firm rejection of the death penalty shows to what extent it is possible to recognize the inalienable dignity of every human being and to accept that he or she has a place in this universe.’ <https://www.americamagazine.org/politics-society/2020/10/04/pope-francis-closes-door-death-penalty-fratelli-tutti>

2. The death penalty is inherently cruel.

Opponents of the death penalty argue that irrespective of the method used, the death penalty inflicts unacceptable levels of pain and suffering upon those who are killed in this manner. A study of autopsy reports from prisoners executed via lethal injection (the form of execution being used by the federal government until November 2020) have found disturbing results. A report published in *The Intercept* on February 7, 2019, found, ‘A majority showed signs of pulmonary edema, an accumulation of fluid in the lungs. Several showed bloody froth that oozed from the lungs during the autopsy — evidence that the buildup had been sudden, severe, and harrowing... the autopsies showed the executed men felt the panic and terror of asphyxiation before they died.’ <https://theintercept.com/2019/02/07/death-penalty-lethal-injection-midazolam-ohio/>

The report continued, ‘midazolam...[the drug] used to provide anesthesia [is] a sedative, not a barbiturate. Anesthesiologists had warned for years that even at extremely high doses, midazolam did not have the properties to render a person insensate — immune to pain — for the purpose of lethal injection. The second and third drugs in Ohio’s protocol — a paralytic that stops respiration and potassium chloride to stop the heart — were known to be excruciating if injected without a proper anesthetic. Experts likened the effect to being buried alive while feeling fire in one’s veins.’ <https://theintercept.com/2019/02/07/death-penalty-lethal-injection-midazolam-ohio/> Sodium thiopental, the drug previously used as an anesthetic, is no longer being produced, in part in response to protests over its use in executions. https://www.csg.org/pubs/capitolideas/enews/issue65_4.aspx

Given the objections that have now been lodged about lethal injection as a means of execution and the shortage of some of the drugs formally used for this purpose, the Trump administration has expanded the modes of execution available to it. On November 27, 2020, it stated, ‘Federal executions are to be carried out by lethal injection or by any other manner prescribed by the law of the State in which the sentence was imposed.’ What this allows is the federal government to use a range of methods of execution which have themselves been challenged based on their cruelty – hanging, the electric chair, the gas chamber and firing squads. <https://slate.com/news-and-politics/2020/11/trump-approves-hanging-firing-squads-executions.html>

In an opinion piece published in *Slate* magazine on November 30, 2020, Austin Sarat stated, ‘While lethal injection is by no means an execution panacea, Trump and his minions have embraced outdated ways of carrying out death sentences.’ <https://slate.com/news-and-politics/2020/11/trump-approves-hanging-firing-squads-executions.html>

Sarat then outlined some of the cruelties involved in other forms of execution. He states, ‘Throughout most of our history, hanging was the primary method of execution. The first instance occurred in 1622...and from then until now several different hanging methods have been tried. None of them has proven foolproof, and many have been botched, with a slow death frequently caused by strangulation, accompanied by convulsions, defecation, and protruding eyes and tongue.’ <https://slate.com/news-and-politics/2020/11/trump-approves-hanging-firing-squads-executions.html>

Describing the operation of the electric chair, Sarat writes, ‘The condemned is strapped to a wooden chair, and a metal cap connected to electrodes is placed on his/her head. Thirty-second jolts of between 500 and 2,000 volts are then applied multiple times, with executioners checking for a heartbeat in between. The process repeats until the prisoner is dead. But, like hanging, electrocution has proved to be far from reliable. Even when the process is done correctly, it is brutal, with the prisoner convulsing, swelling, and defecating.’

<https://slate.com/news-and-politics/2020/11/trump-approves-hanging-firing-squads-executions.html>

Sarat has also described the deficiencies of the gas chamber, ‘The condemned is seated in an airtight room, and hydrogen cyanide gas is pumped into the room. He is supposed to lose consciousness and die painlessly; however, witnesses have often reported evidence of extreme pain, with eyes popping and skin turning purple.’ <https://slate.com/news-and-politics/2020/11/trump-approves-hanging-firing-squads-executions.html>

Critics further note that not only are all forms of execution cruel in their operation their cause great emotional distress to the person awaiting execution, distress that is heightened by the conditions within which they are detained.

<https://repository.gchumanrights.org/bitstream/handle/20.500.11825/174/Hempel.pdf?sequence=1&isAllowed=y>

3. The death penalty risks executing innocent people.

Among the principal objections to the death penalty is that it creates the possibility that innocent people will be convicted and executed.

The United States president-elect, Joe Biden, was, earlier in his political career, a supporter of the death penalty. He has now become an opponent, primarily on the basis that there is the ongoing risk of executing an innocent person.

On December 17, 2019, the Death Penalty Information Center outlined the number of people on death row in the United States whose convictions had been overturned that year and others who despite concerns regarding their convictions were executed.

The Center stated, ‘Three more former death-row prisoners were exonerated in 2019, increasing the number of documented U.S. death-row exonerations [since 1973] to 167. Two exonerations came in cases from the 1970s, highlighting the failure of the normal judicial review process to meaningfully protect the innocent...’

In addition to those who have been exonerated after having been originally sentenced to death, there are significant numbers of people whose convictions have been called into doubt too late. The Death Penalty Information Center lists some twenty people who have been executed since 1989 and whose convictions have been called into serious doubt.

<https://deathpenaltyinfo.org/policy-issues/innocence/executed-but-possibly-innocent> These include: Carlos DeLuna (Texas, convicted 1983, executed 1989); Ruben Cantu (Texas, convicted 1985, executed 1993); Larry Griffin (Missouri, convicted 1981, executed 1995); Joseph O’Dell (Virginia, convicted 1986, executed 1997); David Spence (Texas, convicted 1984, executed 1997); Leo Jones (Florida, convicted 1981, executed 1998) Gary Graham (Texas, convicted 1981, executed 2000); Claude Jones (Texas, convicted 1989, executed 2000); Cameron Todd Willingham (Texas, convicted 1992, executed 2004); Sedley Alley (Tennessee, convicted 1987, executed 2006); Troy Davis (Georgia, convicted 1991, executed 2011); Lester Bower (Texas, convicted 1984, executed 2015); Brian Terrell (Georgia, convicted 1995, executed 2015); Richard Masterson (Texas, convicted 2002, executed 2016); Robert Pruett (Texas, convicted 2002, executed 2017); Carlton Michael Gary (Georgia, convicted 1986, executed 2018); Dominique Ray (Alabama — Convicted: 1999; Executed 2019); and Larry Swearingen (Texas, convicted 2000, executed 2019).

Recently, the risk of wrongful executions drew public attention and outcry in the cases of James Dailey and Rodney Reed, who faced execution dates despite powerful evidence of innocence. But in less highly publicized cases, two other prisoners with evidence of probable innocence were executed. As new evidence pointing to a different killer emerged, Tennessee

refused to conduct available DNA testing that had the potential to exonerate a man it may have wrongfully executed in 2006.’ <https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-death-penalty-in-2019-year-end-report>

On December 20, 2020, Lauren Pickett, in-depth editor of The Messenger, highlighted the unreliability of the American criminal justice system, noting that one tenth of those people sentenced to death in the United States subsequently have their convictions overturned.

Pickett states, ‘For every nine people executed in this country, one person has been exonerated, and this does not include those who were executed despite compelling evidence of innocence or who were found to be innocent after their execution.’ Studies have also been undertaken as to the number of people who are likely to have been executed following false convictions. In April 2014, the Proceedings of the National Academy of Sciences released a report which estimated that one in every 25 have been sentenced to death for a crime they did not commit. <https://www.newsweek.com/one-25-executed-us-innocent-study-claims-248889> Critics of capital punishment cannot accept that the system allows innocent people to be sentenced to death and executed.

4. The death penalty is not a likely deterrent

Opponents of the death penalty argue it has no proven deterrent value and ignores the possibility of prisoner rehabilitation.

Researchers have argued that it is impossible to demonstrate conclusively from a study of data that the death penalty acts as a deterrent to potential criminals. They have noted that there is no reliable way of demonstrating empirically that capital punishment influences crime. This is because it is not possible to determine conclusively the link between employing capital punishment and the rate of crime in a particular jurisdiction. Rises or falls in the offence rate can be caused by a wide range of factors and the exact influence of anyone cannot be demonstrated.

A comprehensive review of the research in this area over 34 years was conducted in 2012 by a committee of the American National Academy of Sciences National Review Council. The committee concluded, ‘The committee concluded that "research to date on the effect of capital punishment on homicide is not informative about whether capital punishment decreases, increases, or has no effect on homicide rates... The data alone cannot reveal what the homicide rate in a state without...a capital punishment regime would have been had the state...had such a regime.’ [https://www.abc.net.au/news/2015-02-26/fact-check3a-does-the-death-penalty-](https://www.abc.net.au/news/2015-02-26/fact-check3a-does-the-death-penalty-deter3f/6116030?nw=0#:~:text=%22In%20short%2C%20the%20consensus%20among,imprisonment%2C%22%20the%20study%20said.&text=%22The%20number%20of%20homicide%20studies,deterrent%20effect%2C%22%20he%20said.It%20argued%20that%20the%20same%20was%20true%20for%20any%20state%20that%20employed%20the%20death%20penalty.)

[deter3f/6116030?nw=0#:~:text=%22In%20short%2C%20the%20consensus%20among,imprisonment%2C%22%20the%20study%20said.&text=%22The%20number%20of%20homicide%20studies,deterrent%20effect%2C%22%20he%20said.It%20argued%20that%20the%20same%20was%20true%20for%20any%20state%20that%20employed%20the%20death%20penalty.](https://www.abc.net.au/news/2015-02-26/fact-check3a-does-the-death-penalty-deter3f/6116030?nw=0#:~:text=%22In%20short%2C%20the%20consensus%20among,imprisonment%2C%22%20the%20study%20said.&text=%22The%20number%20of%20homicide%20studies,deterrent%20effect%2C%22%20he%20said.It%20argued%20that%20the%20same%20was%20true%20for%20any%20state%20that%20employed%20the%20death%20penalty.)

A February 2015 review of the research by the Brennan Center for Justice found no evidence that the death penalty had an impact on crime in the 1990s and 2000s, and it concluded that the studies that suggested there was a deterrent effect were methodologically weak.

<https://www.vox.com/2015/6/29/8861727/antonin-scalia-death-penalty>

Some opponents of capital punishment have used the views of law enforcement specialists to support claims it is ineffective. The American Civil Liberties Union (ACLU) has stated, ‘The death penalty...has no public safety benefit. The vast majority of law enforcement professionals surveyed agree that capital punishment does not deter violent crime; a survey of police chiefs nationwide found they rank the death penalty lowest among ways to reduce

violent crime. They ranked increasing the number of police officers, reducing drug abuse, and creating a better economy with more jobs higher than the death penalty as the best ways to reduce violence. The FBI has found the states with the death penalty have the highest murder rates.’ <https://www.aclu.org/other/case-against-death-penalty>

Critics have also used an analysis of murderers behaviour patterns and motivations to demonstrate why the death penalty is likely to deter them from committing the crime. The ACLU states, ‘Most capital crimes are committed during moments of great emotional stress or under the influence of drugs or alcohol, when logical thinking has been suspended. Many capital crimes are committed by the badly emotionally damaged or mentally ill. In such cases, violence is inflicted by persons unable to appreciate the consequences to themselves as well as to others.’ <https://www.aclu.org/other/case-against-death-penalty> Similar claims have been made by the Brennan Center, ‘[I]t is debatable whether an individual even engages in such objective calculations before committing a crime. Much psychological and sociological research suggests that many criminal acts are crimes of passion or committed in a heated moment based only on immediate circumstances, and thus potential offenders may not consider or weigh longer-term possibilities of punishment and capture, including the possibility of capital punishment.’ <https://www.vox.com/2015/6/29/8861727/antonin-scalia-death-penalty>

It is also argued that capital punishment does not serve to deter because when murder is more deliberately planned the perpetrators do not believe they will be caught and punished. The ACLU notes, ‘Even when crime is planned, the criminal ordinarily concentrates on escaping detection, arrest, and conviction. The threat of even the severest punishment will not discourage those who expect to escape detection and arrest...Furthermore, the death penalty is a futile threat for political terrorists, like Timothy McVeigh, because they usually act in the name of an ideology that honors its martyrs.’ <https://www.aclu.org/other/case-against-death-penalty>

5. The death penalty is racially and socially discriminatory

Opponents of capital punishment argue that it is not applied in a fair and non-discriminatory manner. They argue that poor and non-white defendants are regularly executed for crimes which for wealthy, white defendants would result in imprisonment.

The American Civil Liberties Union has stated, ‘The death penalty system in the US is applied in an unfair and unjust manner against people, largely dependent on how much money they have, the skill of their attorneys, race of the victim and where the crime took place. People of color are far more likely to be executed than white people, especially if the victim is white.’ <https://www.aclu.org/other/case-against-death-penalty>

Referring to the impact of social position and wealth on the death penalty, the United Nations has stated, ‘People living in poverty are disproportionately affected by the death penalty for many reasons. They are an easy target for the police, they cannot afford a lawyer, the free legal assistance they might receive is of low quality, procuring expert evidence is beyond their means, tracing witnesses is too costly, and access to appeals often depends on being able to afford extra counsel. Many cannot afford bail and therefore remain in custody before their trials, further hindering their efforts to prepare an effective defence.’

<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22208&LangID=E#:~:text=%E2%80%9CIf%20you%20are%20poor%2C%20the,from%20lower%20socio%20Deconomic%20groups.>

Referring specifically to the impact of race on the likelihood of a convicted person receiving the death penalty, the Death Penalty Information Center has noted, ‘Today there is growing evidence that racial bias continues in society, particularly within the criminal justice system. The existence of implicit racial bias among some law enforcement officers, witnesses, jurors, and others allows harsher punishment of minorities, even without legal sanction or intention. Although these prejudices are hard to uproot, the unfair application of the death penalty could be halted by eliminating that sentencing option altogether.’

<https://deathpenaltyinfo.org/policy-issues/race>

The Death Penalty Information Center released a report in September 2020 titled ‘Enduring Justice – The Persistence of Racial Discrimination in the US Death Penalty’. The report notes, ‘Throughout the modern era of capital punishment, people of color have been overrepresented on death row. In 1980, 45.6 percent of death row prisoners were people of color, and this percentage has increased every decade. By 2019, this percentage had risen to 57.8 percent. Currently, white and African-American prisoners each comprise 42 percent of those on death row and Latinx prisoners make up 13 percent, with 3 percent of death row comprised of other races/ethnicities. These figures can be contrasted with the racial and ethnic makeup of the population as a whole. Approximately 60.4 percent of the population is white.’ <https://files.deathpenaltyinfo.org/documents/reports/Enduring-Injustice-Race-and-the-Death-Penalty-2020.pdf>

This grossly disproportionate representation of non-white prisoners facing the death penalty is seen as evidence of a prejudiced criminal justice system. As further evidence of this the report noted that juries are more than four times as likely to vote for a mandatory death sentence in cases where the murder victim is white than when the victim is of another ethnicity. <https://files.deathpenaltyinfo.org/documents/reports/Enduring-Injustice-Race-and-the-Death-Penalty-2020.pdf>

The report suggests that this bias operates at all levels of the system – among juries, defence counsel, prosecutors, and judges – and that it is founded in prejudices and behaviours that date back to slavery. It states, ‘Virginia provides an illustration of how much race determined who was executed for non-murder crimes. Before the Civil War, Virginia explicitly provided different penalties for white people and its enslaved population. By 1848, white people could be sentenced to death only for first-degree murder while enslaved Black people could be executed for a number of non-homicide offenses. Although this formal distinction was gone by the twentieth century, the state’s executions showed that in practice different rules were being applied to white and Black defendants.’

<https://files.deathpenaltyinfo.org/documents/reports/Enduring-Injustice-Race-and-the-Death-Penalty-2020.pdf>

Opponents of the death penalty argue that a convicted person’s life should never be taken when their social situation or race may be the decisive factor in determining their sentence.

Arguments against abolishing the death penalty

1. The death penalty is the most appropriate response for certain heinous crimes.

Defenders of the death penalty argue that it is only applied to the most grievous of crimes, crimes which of their very nature represent a complete disregard for the rule of law and the value of human life.

Writing in July 2019, Graeme Wood, a staff writer for The Atlantic, stated, ‘There are crimes that deserve death... Certain crimes are so depraved that merely to witness or read about

them is to feel traumatized and victimized, secondhand.’

<https://www.theatlantic.com/ideas/archive/2019/07/chekhov-capital-punishment/595120/>

According to this line of argument, such crimes forfeit the perpetrator’s right to have his or her life respected. Certain actions, it is argued, place a person outside the normal social contract of mutual obligation which operates in most societies. It is argued that as a principle of justice, the perpetrators of such crimes must be punished by forfeiting their lives.

Judges sometimes state this consideration when passing sentence on offenders. In 2002, Orange County Chief Circuit Judge Belvin Perry stated in passing sentence on a man convicted of kidnap and murder, ‘You have not only forfeited your right to live among us as a free man, but...you have forfeited your right to live at all.’

<https://www.orlandosentinel.com/news/os-xpm-2002-09-20-0209200385-story.html>

Responding to the convicted man’s plea that he would attempt to make amends by living a reformed life in prison, Judge Perry referred to the nature of his crime which the jurors had found to be ‘especially heinous, atrocious [and] cruel’. Commenting on the kidnapped murder victim, the Judge noted, ‘The horror, the agony, the emotional strain and fear she must have felt knowing of her impending death is beyond comprehension.’

<https://www.orlandosentinel.com/news/os-xpm-2002-09-20-0209200385-story.html>

The work of numerous philosophers has been used to support this view regarding certain crimes justifying the death penalty. Eighteenth century English philosopher, John Locke, supported capital punishment under these circumstances, stating, ‘a criminal who, having renounced reason...has, by the unjust violence and slaughter he has committed...declared war against all mankind... may be destroyed...’

https://www.lsus.edu/Documents/Offices%20and%20Services/CommunityOutreach/JournalOfIdeology/lockean%20defense_delisi_roark.pdf

Defenders of the death penalty note that the United States only applies it to the most serious crimes. The United States federal government lists 41 capital offenses that are punishable by death. <https://deathpenalty.procon.org/federal-capital-offenses/>

Under current Supreme Court precedent, only homicidal crimes may be punishable by death.

What is more, many states require prosecutors to prove that at least one aggravating factor occurred at the time of the killing. An aggravating factor could include any of the following:

Torture, extreme depravity, or an extremely heinous and atrocious killing

Killing that occurred during the commission of a first-degree felony, including robbery, kidnapping or rape

The murder was committed for pecuniary gain (i.e., by a “hit man”)

The victim was a police officer, government official, informant, or witness

The victim was particularly vulnerable, such as a child or an elderly, pregnant or disabled person

The murder was a hate crime committed because of the victim’s race, gender, nationality, ancestry, or religion <https://stories.avvo.com/nakedlaw/opinion/american-death-penalty-tragedy-errors.html>

Although United States state and federal statutes contain various capital crimes other than those involving the death of the victim, the United States Supreme Court addressed this issue in 2008 and ruled that in practice the death penalty should be applied only where a life had been taken. Former United States Supreme Court Justice Anthony Kennedy, writing for the majority in *Kennedy v. Louisiana* (2008) stated, ‘As it relates to crimes against individuals...the death penalty should not be expanded to instances where the victim’s life

was not taken.’ <https://deathpenaltyinfo.org/facts-and-research/crimes-punishable-by-death/death-penalty-for-offenses-other-than-murder>

2. Capital punishment gives a sense of closure to the families and friends of murder victims Those who support capital punishment often argue that ending the life of the perpetrator gives redress to the family and friends of the murder victim and allows them to move on with their lives with some feeling of closure.

This is the view that has been adopted by President Trump and his administration. Attorney General William Barr has stated, ‘We owe it to the victims and their families to carry forward the sentence imposed by our justice system.’ <https://www.justice.gov/opa/pr/federal-government-resume-capital-punishment-after-nearly-two-decade-lapse>

The importance of the effect of the crime of murder on those who have been left behind has become increasingly recognised in the United States. Victim impact statements are now routinely included in sentencing hearings so that juries can be aware of the effect of the crime on the friends and family of the deceased.

United States Chief Justice William Rehnquist has defended the importance on these impact statements in helping to determine the punishment given the convicted murderer. Rehnquist has stated, ‘Victim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question. ...It ensures that the victim is not a faceless stranger, and redresses the unfairness of criminal sentencing, which focuses solely on the life and circumstances of the offender.’

<https://theconversation.com/when-families-of-murder-victims-speak-at-death-penalty-trials-their-anguish-may-make-sentencing-less-fair-146387>

Currently ten death row prisoners have been executed at the direction of the Trump administration with three more scheduled before Trump’s presidency ends on January 20, 2021. Two of those already executed are Christopher Vialva (executed on September 24) and Brandon Bernard (executed on December 10) for the 1999 murders of youth ministers Todd and Stacie Bagley in Texas. <https://www.newsweek.com/inmates-executed-trump-administration-1553498>

The families of Todd and Stacie Bagley have expressed gratitude to President Trump, Attorney General William Barr, and other officials. Speaking for herself and her husband, Mrs Bagley issued a statement after Christopher Vialva’s execution in which she stated, ‘We have had to wait for 21 years for justice and closure...I want to make sure to thank everyone that participated in seeing that Todd and Stacie received justice for this horrific crime... We appreciate that President Trump felt compassion to the victims and the families to reinstate the Death Penalty and allow us some closure and to give Todd and Stacie justice.’

<https://www.mywabashvalley.com/federal-executions/statement-from-todd-bagleys-mother-georgia/>

The Bagley family also issued a statement following the second execution. They again stated it had been ‘very difficult’ to wait 21 years for the sentence imposed ‘on those who cruelly participated in the destruction of our children, to be finally completed...The lives of family and friends were shattered, and we all have grieved for 21 years waiting for justice to finally be served...Thank you to all who were involved in this process of getting justice for Todd and Stacie.’ <https://www.bbc.com/news/world-us-canada-55261224>

Similar sentiments were also expressed following the execution of Lezmond Charles Mitchell, who was put to death for the 2001 murders of Alyce Slim, a 63-year-old Navajo woman, and her 9-year-old granddaughter Tiffany Lee.

Tiffany Lee's father stated, 'I have waited 19 years to get justice for my daughter, Tiffany. I will never get Tiffany back, but I hope that this will bring some closure... Had it not been for the Trump administration, I do not think I would have ever received justice or a sense of finality.' <https://navajotimes.com/reznews/father-of-9-year-old-i-have-waited-19-years-to-get-justice-for-my-daughter/>

3. Capital punishment is the only permanent protection from the worst offenders

Defenders of capital punishment argue that it permanently removes from society those who are regarded as posing a dire, on-going threat.

One of the dangers posed by prisoners who are not executed is that they will break out of jail. Those sentenced to life imprisonment are seen as an ongoing escape risk. On March 30, 2001, The National Review published a comment by Deroy Murdock in which he stated, 'Life sentences too often are mere challenges for prisoners to escape, from which they aspire to terrify law-abiding citizens and sometimes kill again.' In the article, Murdock described the escapes of some fifteen prisoners serving life sentences over a period of ten years. Most of these escapes had occurred over the previous twelve months.

<https://www.nationalreview.com/2001/03/more-executions-less-escapes-deroy-murdock/> Murdock supplied detailed accounts of some of these escapes. All involved further crimes and risk to members of the community. He described how, 'After escaping a Florida prison in 1991, John Fred Woolard shot and killed a park ranger. Last May 28, [2001] Woolard escaped again, this time from a Mississippi prison, accompanied by armed robber Roy Randall Harper. The two convicts allegedly fired at a sheriff's deputy who stopped them for speeding, then embarked on a high-speed chase in a stolen van last June 14. Woolard surrendered three days later, after a final getaway bid in yet another carjacked van.'

<https://www.nationalreview.com/2001/03/more-executions-less-escapes-deroy-murdock/> Woolard's escapes resulted in one death, the unlawful discharge of a firearm, the theft of two motor vehicles and a high-speed chase to avoid recapture. Supporters of the death penalty note that the risks to the community from such escapes are obvious

Captain Dave Arnold, personnel director at the Virginia Peninsula Regional Jail in Williamsburg has explained that there are many sentenced to life in prison whose primary focus becomes to escape. Arnold stated, 'There are always people who rebel against being contained. There are those who will take that to heart and make it their mission to get out. These guys can look for all kinds of flaws [in the prison system]. It's their job to poke holes in the system.'

<https://www.nationalreview.com/2001/03/more-executions-less-escapes-deroy-murdock/> Those who favour the death penalty also argue that life in prison represents a threat to prison guards and other prisoners. An opinion piece written by Michael Dalton and published in the Utah-based Deseret News argues 'Life in prison...is not really a viable solution, since many murders are committed in prison. Fellow inmates and guards alike have been killed by imprisoned murderers, and it is not fair for non-violent criminals to be imprisoned with convicted murderers.' <https://www.deseret.com/2001/7/3/19594428/death-penalty-protects-us> On March 24, 2019, The Houston Chronicle published an article outlining the disadvantages of working as a correctional officer. The report noted, 'Prison guards have the second highest mortality rates of any profession; extreme stress, substance abuse, depression, workplace injuries and suicidal thoughts, are just a few of their daily struggles... It's not uncommon for jail guards to see inmates killing each other, engaging in large-scale fights or setting their cells on fire. Some prisoners will harm themselves or commit suicide. Hepatitis, AIDS and

other infectious disease are common in a prison environment — and you'll be exposed to these risks on a daily basis'. <https://work.chron.com/disadvantages-being-correctional-officer-10287.html>

The psychological dangers faced by prison guards are particularly high. 'As a result of extreme stress, depression and PTSD, jail guards are more likely to commit suicide. Some sources say that suicide rates among prison employees are 39 percent higher than those of the average person. Approximately 10 percent of corrections officers and 14 percent of retired guards have attempted suicide or thought about killing themselves.'

<https://work.chron.com/disadvantages-being-correctional-officer-10287.html>

Defenders of the death penalty note that guards are put at very high risk when having to deal with prisoners serving life sentences.

4. The state supplies those accused of capital crimes with protections against a miscarriage of justice

Defenders of the death penalty argue that those accused of capital crimes are supplied with many legal protections to ensure that no innocent person is convicted and then executed for a crime he or she did not commit.

Before a defendant faces federal prosecution for a serious criminal charge, a grand jury must have determined that there is enough evidence against them to justify their being brought before a court. The grand jury sits in secret. It is made up of between six and 23 citizens and has investigative powers. This protection against unjust prosecution was put in place by the Fifth Amendment to the United States Constitution (1791).

<https://www.justice.gov/usao/justice-101/charging>

While all states have provisions to allow for grand juries, only around half use them, with other states preferring to rely on a preliminary hearing to determine whether to indict a defendant on non-federal charges. <https://www.bbc.com/news/world-us-canada-40823390>

The Fifth Amendment also protects citizens against being compelled to give evidence against themselves and against being tried twice for the same criminal offence. These protections are intended to safeguard the defendant from malicious prosecution which involves the unjust or unsupported prosecution of a defendant.

https://www.law.cornell.edu/constitution/fifth_amendment#:~:text=In%20criminal%20cases%2C%20the%20Fifth,and%20protects%20against%20self%2Dincrimination.

The Sixth Amendment to the United States Constitution (1791) gives all those facing a criminal charge in a federal court the right to a lawyer to assist in their defence. Where they are unable to afford to pay for an attorney one will be supplied. The same right to counsel for those facing a felony charge before a state court has been in place since 1963.

https://www.law.cornell.edu/wex/right_to_counsel#:~:text=Overview,to%20counsel%20in%20federal%20prosecutions.

The Sixth Amendment and in the Constitution all those facing felony charges have the right to trial by jury. <https://www.law.cornell.edu/constitution-conan/amendment-6/jury-trial>

In the 1968 ruling in *Duncan v. Louisiana*, it was determined 'Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. . . '

<https://www.law.cornell.edu/constitution-conan/amendment-6/jury-trial#fn59amd6>

The central role of a jury in protecting the rights of the defendant is particularly important when the defendant has been found guilty of a crime for which he or she might be sentenced

to death. In most instances, the decision as to whether the death penalty should be applied is taken by a jury. <http://campbelllawobserver.com/who-decides-on-life-or-death-judge-or-jury/> In 2007 the Marquette Law Review published an overview of the protections offered to those accused of capital crimes. It noted, 'Defendants must have a dual trial, the first one to establish guilt or innocence.

If found guilty, a second trial is held to determine whether they get the death penalty or a lesser sentence. For example, in Texas, consideration of the death penalty during the punishment phase of the capital murder trial is based on whether the defendant is a continuing threat to society and whether mitigating evidence related to the person's character, background, and moral culpability warrants a sentence of life imprisonment.

A death sentence results in a mandatory automatic appeal to a higher court. The average length of time from sentence to execution is over twelve years because of the extensive appellate [appeal] process.'

<https://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1140&context=mulr>

5. The death penalty reflects the 'standards of decency' of American society

The death penalty is sometimes justified because has popular support among Americans. Popular attitudes to the death penalty are extremely important in determining the legitimacy of the punishment. Challenges mounted in the Supreme Court to capital punishment have often centred on whether it should be judged 'cruel and unusual punishment'. 'Cruel and unusual punishment' is prohibited under the Eighth Amendment to the United States Constitution. Such punishments include torture, deliberately degrading punishment, or punishment that is too severe for the crime committed.

Since the 1950s, the Supreme Court has not made an independent judgement on whether capital punishment is too severe for the crimes that currently attract it. The Supreme Court, in attempting to determine whether a punishment is 'cruel and unusual', asks whether the punishment coincides with society's 'evolving standards of decency.'

<https://deathpenaltyinfo.org/facts-and-research/public-opinion-polls> This concept was first articulated by Chief Justice Earl Warren in 1958, in *Trop v. Dulles*, when he wrote that the Eighth Amendment is not static but 'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.'

<https://www.comnetwork.org/insights/standards-of-decency-seeking-to-abolish-the-death-penalty/#:~:text=In%202004%2C%20the%20Supreme%20Court,death%20penalty%20for%20all%20minors.&text=Specifically%2C%20the%20Court%20stated%20that,evolving%20standards%20of%20decency%E2%80%9D%20test>. This effectively means that if the American populace supports the death penalty for particular sorts of crime then that is allowable under the United States Constitution, as the practice is in line with community standards. For the Supreme Court to abolish the death penalty, justices would need to be convinced that the 'standards of decency' of United States society had evolved to the point that capital punishment for adults was considered 'cruel and unusual' punishment.

<https://www.comnetwork.org/insights/standards-of-decency-seeking-to-abolish-the-death-penalty/#:~:text=In%202004%2C%20the%20Supreme%20Court,death%20penalty%20for%20all%20minors.&text=Specifically%2C%20the%20Court%20stated%20that,evolving%20standards%20of%20decency%E2%80%9D%20test>. Supporters of the death penalty argue that this point has not currently been reached.

Majority support among Americans for the death penalty for persons convicted of murder has been the norm since Gallop started polling in 1937. On only four occasions since have fewer

than 50 percent of respondents supported capital punishment – 1957, 1965, 1966 and 1971. The highest level of support was 80 percent in 1994. For each year since 2017 support has ranged between 55 and 56 percent. <https://news.gallup.com/poll/1606/death-penalty.aspx> Most religious Americans support the death penalty for serious crimes. Mormons (75 percent), Protestants (74 percent), Roman Catholics (71 percent), and Eastern or Greek Orthodox Americans (64 percent) all express support for capital punishment. Most Atheists oppose (58 percent) the death penalty as a punishment for the most serious crimes. <https://today.yougov.com/topics/politics/articles-reports/2020/07/13/how-america-feel-about-death-penalty-today>

Public opinion polls have not been judged as sufficient to demonstrate to the justices of the Supreme Court that the death penalty should no longer be judged constitutional. Other possible markers of a loss of popular support would be more states striking down their death penalty laws; fewer prosecutors seeking the death penalty and fewer juries and judges sentencing people to death. <https://www.comnetwork.org/insights/standards-of-decency-seeking-to-abolish-the-death-penalty/#:~:text=In%202004%2C%20the%20Supreme%20Court,death%20penalty%20for%20all%20minors.&text=Specifically%2C%20the%20Court%20stated%20that,evolving%20standards%20of%20decency%20of%20decency%E2%80%9D%20test>.

Currently, 30 American states, the federal government and the United States military authorize the death penalty, while 20 states and the District of Columbia do not. Although executions are in decline across almost all states, the federal governments authorization of capital punishment has been at an historic high toward the end of Trump's presidency. <https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-death-penalty-in-2020-year-end-report>

<https://www.pbs.org/wgbh/pages/frontline/angel/procon/haagarticle.html>

https://scholarship.law.marquette.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1030&context=mulr_conferences

Further implications

At the end of 2020 there appeared to be a move away from capital punishment in the United States. More American states had abolished the death penalty or gone ten years without an execution, more counties had elected prosecutors opposed to the death penalty and fewer death sentences than in any year prior to 1972, the year in which the Supreme Court struck down United States death penalty laws in 1972. Despite the thirteen executions carried out by the federal administration, fewer executions were carried out in 2020 than in any year in the preceding three decades. <https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-death-penalty-in-2020-year-end-report>

One way for the punishment to be abolished across the United States would be for all state legislatures and the federal government to remove the penalty. This is like the situation in Australia where capital punishment (now abolished in this country) came under the jurisdiction of the states. It was state criminal codes that determined whether these penalties were able to be applied and so state parliaments had to pass legislation altering each of these codes for capital punishment in Australia to stop. Queensland was the first state to abolish the

death penalty for all crimes in 1922 and New South Wales became the last in 1985.

[https://www.lawcouncil.asn.au/policy-agenda/human-rights/death-](https://www.lawcouncil.asn.au/policy-agenda/human-rights/death-penalty#:~:text=QLD%20was%20the%20first%20to,was%20the%20last%20in%201985.)

[penalty#:~:text=QLD%20was%20the%20first%20to,was%20the%20last%20in%201985.](https://www.lawcouncil.asn.au/policy-agenda/human-rights/death-penalty#:~:text=QLD%20was%20the%20first%20to,was%20the%20last%20in%201985.)

Currently in the United States 28 states apply the penalty and 22 have abolished it, though many of the states that could still apply the penalty have not done so for years and have not sought to execute convicted prisoners on death row.

https://en.wikipedia.org/wiki/Capital_punishment_in_the_United_States In addition, until the recent spate of executions during the final months of the Trump administration, capital punishment had fallen out of favour with successive federal administrations. Unlike Australia, United States federal courts can inflict the death penalty and federal administrations can sanction the implementation of the punishment. Thus, removing the penalty across the country would require its abolition in the remaining states that allow it and by the federal Supreme Court.

However, if the Supreme Court were to strike down the death penalty as unconstitutional this would make it illegal to apply it any American state as all must operate under the directions laid down by the country's constitution. Thus, in 1972, the Supreme Court ruled the death penalty unconstitutional as it violated the constitutional amendment that prohibited 'cruel and unusual punishments.' This led to executions being outlawed across the country for four years, until a succession of states altered their procedures so that the manner of their prosecutions and executions fell within the terms the Supreme Court judged constitutional. The Supreme Court made a ruling in 1976 which validated the implementation of the death penalty and saw it reapplied in many American states.

https://en.wikipedia.org/wiki/Capital_punishment_in_the_United_States

Crucially, a Supreme Court ruling has made it a judgement of America as a whole as to what constitutes 'cruel and unusual punishment'. Since 1958, The Supreme Court, in attempting to determine whether a punishment is 'cruel and unusual', asks whether the punishment coincides with society's 'evolving standards of decency.' Thus, the Supreme Court has committed itself to assessing current American standards on the issue when determining the constitutional validity of the death penalty. <https://www.comnetwork.org/insights/standards-of-decency-seeking-to-abolish-the-death-penalty/#:~:text=In%202004%2C%20the%20Supreme%20Court,death%20penalty%20for%20all%20minors.&text=Specifically%2C%20the%20Court%20stated%20that,evolving%20standards%20of%20decency%E2%80%9D%20test.>

Given the growing number of states that have abolished the penalty, its declining use among those states that could still apply it, and the general infrequency with which it has been used as a federal punishment, the death penalty no longer seems to coincide with the standards of many United States jurisdictions. This suggests that when next it is challenged before the Supreme Court on the basis of violating the Eighth Amendment, it may again be overturned. The complicating factor, however, is the composition of the Supreme Court. During President Trump's four-year term, three vacancies on the Court have been filled by conservative judges who favour the death penalty, tipping the balance on the Court in this direction. Judges on the United States Supreme Court serve for life and so this pro-death penalty predisposition has been entrenched in the Court. Many more states may need to independently abolish capital

punishment before a majority on the Supreme Court rule that the 'standards of decency' on the question have changed across the country.