What Will it Take to Abolish Capital Punishment: Examining the Effectiveness of Criminology Research and Abolitionist Rhetoric

It has long been established by criminologists that capital punishment has no discernable effect on violent crime, is racist in its implementation, wastes valuable government resources compared to life without parole, and poses a serious risk of executing innocents. Despite this research, the death penalty remains in the United States, with 24 executions taking place in 2023 and over 2,000 inmates on death row in 2024, both according to the Death Penalty Information Center ("Death Row Overview," n.d.; "Executions by State and Year," n.d.). This begs the question, why is capital punishment still being implemented? And what will it take for capital punishment to be abolished nationwide?

At one point, a nationwide ban on capital punishment did occur. In 1972, the Supreme Court temporarily declared capital punishment unconstitutional in their Furman v. Georgia decision. The Court declared it violated the 8th amendment not on its face, but by its implementation at the time, Justice William Douglas claiming "it would seem to be incontestable that the death penalty inflicted on one defendant is 'unusual' if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices." (Furman v. Georgia, 1972)

This was a clear win for criminologists, who had been studying the racist implementation and impact of capital punishment for years at this point. As stated by Gordon P. Waldo, the Florida State University Dean of Criminology who is a member of the Southern Criminal Justice Association, "there were at least 83 documents (journal articles, books, unpublished research reports) cited in the Furman decision," many of which were written by prominent criminological scholars (2019). This case led to a four-year period in which capital punishment was illegal in

the United States, the only time in which this has been the case. It came to an end in 1976 in the Gregg v. Georgia case, which reinstated the death penalty under certain stipulations to prevent it from being used in a discriminatory manner.

The sudden end to the death penalty followed by the equally sudden resurgence of it gives a brief look into the murky and muddled history of the United States and capital punishment. University of Texas at Austin Professor Jordan M. Steiker puts it simply in his article American death penalty exception: Then and now, American capital punishment occupies an "outlier status" when compared to the rest of the western world (2023). Steiker argues that this status is merely a result of an "exceptional" history that America has had with the death penalty, claiming that the founding fathers followed certain principles of Cesare Beccaria's *On Crimes and Punishment*, mainly those of his capital punishment abolition arguments. He points to the Declaration of Independence, specifically where it declares man has certain inalienable rights, among those being a right to life. The founding fathers followed a "Beccaria notion that the right to life is 'God-given,' 'inalienable,' and thus outside of the powers states legitimately can possess." (Steiker, 2023)

While some founders may have been invested in a "right to life," such as Thomas Jefferson revising death penalty laws in Virginia to limit the crimes with death as a possible punishment, this right did not make it into the Constitution or Bill of Rights. While some states did outlaw it entirely, such as Michigan and Wisconsin in the mid-19th century, it also allowed Southern states to implement statutes where "whites could receive the death penalty for four crimes, whereas slaves were subject to over sixty capital offenses" as it "was a powerful tool for keeping the slave population in submission" (Steiker, 2023; Rivkind & Shatz, 2005 as cited in Brazao, 2008).

While this did end after the American Civil War, when the 13th and 14th amendments outlawed chattel slavery and ensured equal protections respectively, it did not stop the South from weaponizing capital punishment against African Americans. "…The use of the death penalty to punish rape… [was used] almost exclusively to punish interracial rape involving black defendants and white victims-even though interracial rape was far less common than intra-racial rape" (Steiker, 2023).

Even when capital punishment was decidedly not implemented in the antebellum period, there could be community backlash which often led to lynchings. Lynchings could happen for a number of reasons, such as distrust of authorities to sentence someone to death, impatience with the judicial process, feeling that state executions weren't suitably violent/painful, or defiance to local/federal authority (Steiker, 2023). A fear of these lynchings even influenced part of the Supreme Court's opinion in the aforementioned Furman v. Georgia case, where in his concurring opinion, Justice Potter Stewart claimed "when people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy -- of self-help, vigilante justice, and lynch law" (1972).

While it may seem rather backwards to be beholden to the whims of a violent or racist mob, the idea of modeling the justice system after societal views is hardly unfounded. In Trop v. Dulles, the Supreme Court stated that the 8th amendment is not static, and instead, "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society" (1958). This "evolving standard of decency" principle has been the foundation for court cases interpreting the 8th amendment since this case and has allowed for a significant narrowing of those who capital punishment is allowed to target.

In 1977 the Supreme Court banned capital punishment for aggravated assault, kidnapping, and rape of an adult woman ("Limiting the death penalty," n.d.). In 1982 they banned executions for those present during a murder but with no personal murderous intent, in 1986 for the criminally insane, in 2004 for someone under the age of 18, and most recently in 2008 for the rape of a child ("Limiting the death penalty," n.d.). These limitations show the Court's willingness to continually limit capital punishment, but also display a hesitation to show the same resolve they displayed in 1972.

In the absence of significant action by the Supreme Court, individual states have taken it upon themselves to repeal capital punishment in their jurisdictions. 23 total states have abolished the death penalty as of 2024, with almost half of those occurring within the past 20 years ("State by state," n.d.). Since 2007, at least one state has outlawed capital punishment every three years, though the last state to do so was Virginia in 2021. A clear win for abolitionists and criminologists, whose work is consistently cited by these states, the process is undoubtedly slow. If the current pace of state abolition continues, which is unlikely due to no state having abolished capital punishment since Virginia, then capital punishment would be entirely outlawed by 2071, 47 years into the future. To put that into perspective, if there are roughly 22 people executed every year until that point, which is roughly the median number of executions per year since 2015, the state will have executed 1,000 more people by the time capital punishment is abolished, nearly doubling the amount of people executed in the United States since the Furman decision (Snell, 2023; "Executions by State and Year," n.d.).

This slow movement to abolish capital punishment and general hesitancy is reflected in the public opinion of the death penalty. Over the past 100 years, the American public approval of capital punishment has fluctuated heavily. Going from 59% approval in 1936, 68% in 1953, 53%

in 1956, 42% in 1966, 54% in 1967, 49% in 1971, 66% in 1976, 75% in 1985, 76% in 1991, 80% in 1994, 66% in 2000, 60% in 2013, to 53% in the current year 2024 ("Death Penalty," 2024). At this point, support for the death penalty is essentially at the point it was nearly 70 years ago, despite a massive increase in the amount of research done by criminologists over the topic since then. Some criminologists believe that the general public is merely not aware of their research and must be educated in order to remedy this issue. As Waldo describes when discussing a possible end to capital punishment, "education… may not be a perfect solution, but it may be the only solution" (2019). This idea, however, is not reflected by polls showing the general public's beliefs.

It is commonly known and accepted that capital punishment is racist in its implementation, does not deter violent crime, and does not reliably avoid executing innocents. In a 2021 Pew Research Center poll, Americans proved they were mostly aware of this, as 56% agreed black people are more likely than white people to be executed for similar crimes, 63% agreed that it does not deter violent crime, and 78% agreed that there is a risk that innocent people may be put to death. However, that same poll showed that 60% of those questioned were in support of the death penalty ("Most Americans Favor the Death Penalty," 2021). Clearly, this shows a disconnect between criminologists and the general population. The public cares more about a perceived sense of justice and moral obligation that comes with executing criminals for violent crimes, as can be seen with 64% of Americans agreeing that the death penalty is "morally justified" for violent crimes such as murder ("Most Americans Favor the Death Penalty," 2021).

Americans favor capital punishment despite its problems due to the belief that there exists a moral obligation for a punishment to fit the severity of the crime. This belief is not unfounded in the American criminal justice system, as it fits well within the theories of

punishment the justice system works under. Retribution, deterrence, and rehabilitation have long been the standard for the theories on criminal punishment, with each having their place in certain aspects of how the United States handles its criminal prosecution (Meyer, 1968). Since the American public has generally come to an understanding that capital punishment does not deter violent crime, the death penalty lies within the retribution category, defined as "vengeance, a way of releasing and expressing hostility towards the criminal and his conduct" (Meyer, 1968).

Depriving one of their "inalienable" right to life is the most direct "eye for an eye" response to a murder, and one that most Americans find perfectly reasonable. This belief of harsh retribution is a staple of American culture. Historically, this has represented itself in violent military retaliation to offenses, such as the nuclear response to Japan bombing Pearl Harbor during World War Two, the near decade long war in Vietnam that officially began due to a United States military vessel being fired upon, or the bloody invasion of Afghanistan in response to al-Qaeda's terrorist attack in 2001. Retribution has prominence in aspects of criminal punishment other than the death penalty, as over 65% of incarcerated individuals are put to work in what is by definition slave labor (American Civil Liberties Union & Global Human Rights Clinic, 2022). While there is a clear profit motive behind this slavery, it is justified to the public by being "just desserts" for an individual's crimes.

This retribution ideal effects not only the one who committed the crime, but the victim or their family as well. For some crimes, this equates to the criminal being ordered to offer some sort of financial compensation for the wrongs they have committed against a victim. A theft, for example, could require a criminal to return a stolen item or pay the victim what that item was worth, plus any additional punitive damages for "pain and suffering." Punishing criminals for the pain and suffering they have caused takes on a much grislier meaning when the victim of their

crime has died as a result of the criminal's actions, as the only pain and suffering equivalent to murder is commonly accepted as death to the murderer.

The ideal of providing justice to a victim or closure to their family has been seen in the highest American court, with Supreme Court Justice Antonin Scalia writing "a crime's unanticipated consequences must be deemed 'irrelevant' to the sentence conflicts with a public sense of justice keen enough that it has found voice in a nationwide 'victims' rights' movement" (Payne v. Tennessee, 1991). Pain and suffering must equate to pain and suffering. The court system will sometimes even speak on behalf of the victims, arguing for what their interests are, and the best way for them to receive closure. In Jones v. Allen, the 11th Circuit Court wrote "not only the State, but also the Nelson children, who watched Jones and his co-defendant kill their parents and attack their grandmother and who themselves were stabbed and shot, have a strong interest in seeing Jones's punishment exacted… The State and the surviving victims have waited long enough for some closure to these heinous crimes" (2007). As Jody Madeira of Indiana University Maurer School of Law summarizes, "judges believe that victim participation is an effective means to therapeutic ends, and that legal proceedings can help victims heal or enhance closure prospects in ways ranging from opportunities for victim impact statements to punishing the offender" (2010).

The idea that retribution is the best way to deal with violent criminals both for victims' closure and societal wellbeing is the heart of public support for capital punishment. People are aware of the possible trouble with executions in the way they have been implemented throughout American history, but that does not change the fact that they want violent criminals to be put to death. Experts can prove time and time again that capital punishment does not deter violent

crime, discriminates against minority groups, and has a high probability of killing innocent people, but this clearly has only a marginal effect on public support for capital punishment.

Criminologists continue to push these points to little effectiveness, with some believing that this path of education and research will eventually lead to an incremental state abolition of capital punishment (Steiker, 2023). Others, such as Austin Sarat of Amherst College, concur, arguing that "abolitionists now argue against capital punishment because of the risk of executing the innocent, the discriminatory way in which it is applied, or the fact of its geographic arbitrariness," which he attributes previous abolition successes to and predicts future successes with this method (Sarat et al, 2017).

These criminologists' approaches seem to neglect the large span of time it will take to incrementally get every state to abolish capital punishment. As mentioned previously, if the same pace is kept for abolition that has been held for the past nearly 20 years, it will still take over 45 years and 1,000 more executions until abolition is accepted nation-wide. This is a generous prediction, as the states that are notably holding out from abolishing capital punishment are Southern states that still heavily utilize it.

Since 1977, eight of the top 10 states that held the most executions have been in the South ("Executions by State and Year," n.d.). Southern states are notably Conservative, as is shown by the past four presidential election results, where only two of these eight states did not vote for a Republican candidate each time and seven have Republican governors. This poses an issue for abolition movements, as Conservatives are far more likely to be in favor of capital punishment than their Liberal counterparts. In 2021, 77% of Republicans favored the death penalty, 80% found it morally justified as a punishment for murder, 72% believed it was equally

applied to black and white people, and 51% thought that it does deter violent crime ("Death Penalty," 2024).

With such strong Republican roots, the criminologist approaches of education, incrementalism, or focus on innocence and discrimination are all unrealistic solutions to abolishing capital punishment. Despite previous research, Republicans still show a strong favoring of the death penalty and show little signs of moving towards abolition. Due to the current six Republican majority in the Supreme Court, another decision in line with Furman seems out of the question for the foreseeable future. This leaves the abolition movement in a precarious situation, as its future seems unclear. This author presents a solution to this issue, one that may seem to be an unreasonable endeavor, but remains the only realistic end to the moral support of capital punishment. There must be an end to the retributionist theory of punishment in the United States.

The general public has proven to find research on discrimination, innocence, and cost to be unconvincing, shown by the lack of significant change in public opinion over the past 50 years and support of the morality of executions. In order to change the public perception of capital punishment, criminologists must focus their efforts on combating the culture of retribution, including the thoughts of "eye for an eye" punishments, slave labor in prisons, focus on punishment as a means of closure for victims, and widely accepted state violence. Organizations such as the National Prison Project have already made steps to fight for prisoners' rights, but there must be more efforts to garner institutional and public support.

While public opinion can influence institutions, such as the "evolving standards of decency" doctrine, institutions can also influence public opinion. The highest time of public support for capital punishment in its polling history was in 1994 at 80% ("Death penalty," 2024).

At this time, the sitting president was Bill Clinton, a staunch Democratic supporter of capital punishment. Clinton signed into bill the Violent Crime Control and Law Enforcement Act of 1994, commonly known as "the most far-reaching crime bill Congress ever passed," which included "[authorization for] the death penalty for dozens of existing and new federal crimes" (Eisen, 2019).

His actions had a notable effect on the public opinion, as it was not until his last year in office that support for capital punishment dropped below 70%, which it has yet to reach again ("Death penalty," 2024). Institutional support for abolition and ending retribution ideals is a necessary step for turning public perception on these issues, which would in turn shift the "evolving standards of decency" to include abolition. With this accomplished, it would be far more likely for the Supreme Court to return to a Furman decision, as retribution ideals would no longer be included in what Americans find "decent."

While criminologists have done incredibly valuable work for limiting capital punishment's scope, the current trajectory does not favor an abolitionist future. The focus must shift to broader goals in order to combat the base issue of capital punishment, the retribution theory of punishment. This includes other methods mentioned by prominent criminologists, such as increasing efforts towards education, but this education must be focused on the inherent contradiction present in retribution ideals and the fundamental American values of life, liberty, and the pursuit of happiness. There must also be more of an effort to sway institutional support on the side of abolition, as elected officials have broad power of the public opinion, and could enact legislation that would gradually increase the public's favor of anti-retribution ideals.

Citations

American Civil Liberties Union & Global Human Rights Clinic. (2022, June 15). Captive Labor: Exploitation of Incarcerated Workers. *The University of Chicago*. https://www.aclu.org/publications/captive-labor-exploitation-incarcerated-workers?redirect=captivelabor

Brazao, M. S. (2008). The Death Penalty in America: Riding the Trojan Horse of the Civil War. *The Modern American*, *4*(2), 26–34. https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1045&context=tma

Death Penalty Information Center. (n.d.). *Death Row Overview*. Death Penalty Information Center. https://deathpenaltyinfo.org/death-row/overview

Death Penalty Information Center. (n.d.). *Executions by State and Year*. Death Penalty Information Center. https://deathpenaltyinfo.org/executions/executions-overview/executions-by-state-and-year

Death Penalty Information Center. (n.d.). *Limiting the Death Penalty*. Death Penalty Information Center. https://deathpenaltyinfo.org/facts-and-research/history-of-the-death-penalty/limiting-the-death-penalty

Death Penalty Information Center. (n.d.). *State by State*. Death Penalty Information Center. https://deathpenaltyinfo.org/states-landing

Eisen, L.-B. (2019, September 9). *The 1994 crime bill and beyond: How federal funding shapes the criminal justice system*. Brennan Center for Justice.

https://www.brennancenter.org/our-work/analysis-opinion/1994-crime-bill-and-beyond-how-federal-funding-shapes-criminal-justice

Furman v. Georgia, 408 U.S. 238 (1972)

Gallup. (2024, October 16). *Death penalty*. Gallup.com. https://news.gallup.com/poll/1606/death-penalty.aspx

Gregg v. Georgia, 428 U.S. 153 (1976)

Jody L. Madeira. (2010). Why Rebottle the Genie?': Capitalizing on Closure in Death Penalty Proceedings. *Indiana Law Journal*, *85*(4). https://web-p-ebscohost-com.tuproxy.palni.edu/ehost/pdfviewer/pdfviewer?vid=1&sid=91e596be-dc17-49a8-8139-1cf4f5e5d35b%40redis

Jones v. Allen, 483 F. Supp. 2d 1142 (2007)

Meyer, J. (1968). Reflections on some theories of punishment. *The Journal of Criminal Law, Criminology, and Police Science, 59*(4), 595–599. https://doi.org/10.2307/1141839

Payne v. Tennessee, 501 U.S. 808 (1991)

Pew Research Center. (2021, June 2). *Most Americans favor the death penalty despite concerns about its administration*. Pew Research Center. https://www.pewresearch.org/politics/2021/06/02/most-americans-favor-the-death-penalty-despite-concerns-about-its-administration/

Sarat, A., Kermes, R., Cambra, H., Curran, A., Kiley, M., & Pant, K. (2017). The rhetoric of abolition continuity and change in the struggle against America's death penalty, 1900-2010. *The Journal of Criminal Law and Criminology (1973-)*, *107*(4), 757–780.

https://web-p-ebscohost-com.tuproxy.palni.edu/ehost/pdfviewer/pdfviewer?vid=0&sid=30bc151a-72c7-485b-b09a-a876e2fb9381%40redis

Snell, T. L. (2023, November 17). *Capital Punishment, 2021 – Statistical Tables*. (NCJ 305534). U.S. Department of Justice. Bureau of Justice Statistics. https://bjs.ojp.gov/document/cp21st.pdf

Steiker, J. (2023). American death penalty exceptionalism, then and now. *California Western International Law Journal*, *53*(2), 291–306. https://advance-lexis-com.tuproxy.palni.edu/document/?pdmfid=1519360&crid=faac4e37-7572-4c75-9a19-168ea52c84b9&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A69CH-SBC1-JD86-N00Y-00000-00&pdcontentcomponentid=153311&pdteaserkey=sr0&pditab=allpods&ecomp=hc-yk&earg=sr0&prid=4bf1926f-aae8-4f5c-b9a3-968d503e4aad

Trop v. Dulles, 356 U.S. 86 (1958)

Waldo, G. P., & Myers, W. (2019). Criminological Research and the Death Penalty: Has Research by Criminologists Impacted Capital Punishment Practices? *American Journal of Criminal Justice : The Journal of the Southern Criminal Justice Association*, *44*(4), 536–580. https://doi.org/10.1007/s12103-019-09478-4