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Life After Sentence of Death: What Becomes of Individuals Under Sentence of Death After Capital Punishment Legislation is Repealed or Invalidated

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**LIFE AFTER SENTENCE OF DEATH:
WHAT BECOMES OF INDIVIDUALS UNDER SENTENCE OF
DEATH AFTER CAPITAL PUNISHMENT LEGISLATION IS
REPEALED OR INVALIDATED**

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I.	Introduction	268
II.	Historical Practices in the United States	276
	A. American Jurisdictions Which Have Repealed or Judicially Invalidated their Death-Penalty Laws	276
	B. Execution Practices in Jurisdictions Following Legislative Repeal or Judicial Invalidation of Death-Penalty Statutes	278
	1. Alaska	278
	2. Arizona.....	279
	3. Colorado.....	282
	4. Connecticut.....	284
	5. Delaware	286
	6. District of Columbia.....	287
	7. Hawaii.....	287
	8. Illinois	288
	9. Iowa	290
	10. Kansas.....	291
	11. Maine	293
	12. Maryland	294
	13. Massachusetts.....	295
	14. Michigan	296
	15. Minnesota.....	297
	16. Missouri	298
	17. New Hampshire	299
	19. New Mexico	302

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20. New York.....	303
21. North Dakota	305
22. Oregon	306
23. Rhode Island.....	310
24. South Dakota	311
25. Tennessee.....	312
26. Vermont	313
27. Virginia	315
28. Washington.....	316
29. West Virginia	317
30. Wisconsin.....	318
III. International Practice: Abolition and Post-Abolition	
Executions	319
A. Canada	320
B. The United Kingdom.....	320
C. Europe and Other Countries Worldwide.....	322
IV. Juveniles and the Death Penalty	325
V. Conclusion.....	327

I. INTRODUCTION

What should become of individuals who are awaiting execution following the repeal or judicial invalidation of capital punishment legislation? Having lawfully been sentenced to death, should their executions go forward? Or since death is no longer an authorized punishment in their jurisdiction, should their capital sentences be invalidated and replaced by life imprisonment? In states debating the abolition of capital punishment, and in states that have taken that step, the fate of individuals who have previously been sentenced to death looms large, complicating repeal initiatives and raising urgent questions in the aftermath of abolition. The ethically, politically, and legally fraught issue of whether offenders previously sentenced to death should or can be executed following a jurisdiction's elimination of capital punishment has repeatedly surfaced and inevitably must be confronted by the legislatures, governors, and occasionally the courts, in states that have considered and recently carried out the abolition of capital punishment.

In the continuing ebb and flow of support for the death penalty throughout the nation's history,¹ the advantage, at least temporarily, has begun to tip in favor of the opponents of capital punishment. Public opinion polls reflect that Americans' enthusiasm for the death penalty has steadily eroded over the past quarter-century. When asked if they were "in favor of the death penalty for a person convicted of murder," 80% of Gallup Poll respondents replied affirmatively in 1996, compared to just 56% in 2019,² and 55% in 2020.³ Provided with a specific choice between punishments for murder, the death penalty or life imprisonment without the possibility of parole, in 2019 a decisive majority expressed a preference for incarceration over execution: 60% to 36%. This marked the first time in the 34 years the Gallup Poll has posed the question that most respondents favored the imprisonment option.⁴

Even more dramatic trends are evident in practice. Death-sentencing rates have plummeted over time. While 300 or more offenders were dispatched annually to the nation's death rows during the mid-1990s, just 34 new death sentences were imposed nationwide in 2019,⁵ and 18 in 2020.⁶ Executions have declined from a modern death-penalty era high of

1. See James R. Acker, *American Capital Punishment Over Changing Times: Policies and Practices*, in HANDBOOK ON CRIME AND DEVIANCE 395 (Marvin D. Krohn, Nicole Hendrix, Gina Penly Hall, & Alan J. Lizotte eds., Springer 2d ed., 2019).

2. Jeffrey M. Jones, *Americans Now Support Life in Prison Over the Death Penalty*, GALLUP (Nov. 25, 2019), <https://news.gallup.com/poll/268514/americans-support-life-prison-death-penalty.aspx> [<https://perma.cc/7QF7-LFS6>].

3. *Death Penalty*, GALLUP, <https://news.gallup.com/poll/1606/death-penalty.aspx> [<https://perma.cc/FTK7-Y9ZW>].

4. *Id.*

5. *The Death Penalty in 2019: Year End Report*, DEATH PENALTY INFO. CTR., 1, 8 (2019), <https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-death-penalty-in-2019-year-end-report> [<https://perma.cc/CH3J-LWYZ>]. The new death sentences were meted out in only 12 jurisdictions: seven in Florida; six in Ohio; four in Texas; three in California, Georgia, and North Carolina; two in Pennsylvania and South Carolina; and one in Alabama, Arizona, Oklahoma, and under federal authority. *Id.* at 11. Forty-three death sentences were imposed in 2018, a year in which an estimated 16,214 murders and non-negligent manslaughters were committed nationwide. *Id.* at 8; *Uniform Crime Reports, 2018 Crime in the United States*, FED. BUREAU OF INVESTIGATION, <https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/topic-pages/murder> [<https://perma.cc/LHF8-JLTT>]. That total includes murders and non-negligent manslaughters in both death-penalty and nondeath-penalty states, and of course not all of the criminal homicides committed in death-penalty jurisdictions would qualify as capital murder. See *Table 5 Crime in the United States*, FED. BUREAU OF INVESTIGATION (2018), <https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/topic-pages/tables/table-5> [<https://perma.cc/P5EE-37J6>] (providing state-by-state breakdown of murders and non-negligent manslaughters committed in 2018).

6. *The Death Penalty in 2020: Year End Report*, DEATH PENALTY INFO. CTR. at 1, <https://reports.deathpenaltyinfo.org/year-end/YearEndReport2020.pdf> [<https://perma.cc/UZ93-X7YK>].

98 in 1999,⁷ to 22 conducted in 2019,⁸ and 17 in 2020.⁹ Twenty-seven states now authorize capital punishment, a sharp reduction from the thirty-eight that did in 2007.¹⁰

Amidst debates about abolition or retention of capital punishment, the question of what will become of individuals currently under sentence of death if capital punishment legislation is repealed has emerged as a prominent sticking point.¹¹ Its resolution is as consequential as it is

7. The Supreme Court's decision invalidating capital sentencing statutes as inconsistent with the Eighth Amendment in *Furman v. Georgia*, 408 U.S. 238 (1972), and its subsequent decisions in *Gregg v. Georgia*, 428 U.S. 153 (1976) and companion cases, which upheld revised guided-discretion death penalty laws, mark the beginning of the modern capital punishment era. See generally Carol S. Steiker & Jordan M. Steiker, *Courting Death: The Supreme Court and Capital Punishment*, 101 THE J. OF CRIM. L. & CRIMINOLOGY 643 (2016).

The first execution under the new sentencing regimes occurred in 1977 when Gary Gilmore's death sentence was carried out by a Utah firing squad. See Deborah W. Denno, *The Firing Squad as 'A Known and Available Alternative Method of Execution' Post-Glossip*, 49 U. MICH. J.L. REFORM 749, 757–58 (2016); see generally Welsh S. White, *Defendants Who Elect Execution*, 48 U. PITT. L. REV. 853 (1987).

8. *The Death Penalty in 2019: Year End Report*, supra note 5, at 1.

9. *The Death Penalty in 2020: Year End Report*, supra note 6, at 1.

10. Since 2007, eight states have legislatively repealed their death-penalty statutes (Colorado, Connecticut, Illinois, Maryland, New Hampshire, New Jersey, New Mexico, and Virginia), while courts in three states have invalidated death-penalty laws on constitutional grounds and legislatures have not reenacted valid capital-sentencing statutes (Delaware, New York, and Washington). The District of Columbia also has repealed the death penalty legislatively. In three of the twenty-seven states that have retained the death penalty, gubernatorial moratoria on executions are in effect. Capital punishment is authorized under federal law and under United States Military law. See, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-in-fact-by-state> [https://perma.cc/4PXZ-6Q6D]. More specific information is provided subsequently about the jurisdictions that no longer authorize capital punishment. See *State by State*, infra note 32 and accompanying text.

11. In Connecticut, for example, the fate of Joshua Komisarjeſky and Steven Hayes, the death-sentenced murderers of members of the Petit family, loomed as a major point of contention with respect to abolition efforts in the state. See, e.g., Christina Ng, *Family Massacre Survivor William Petit Opposes Repeal of CT Death Penalty*, ABC NEWS (Apr. 4, 2012), <https://abcnews.go.com/US/family-massacre-survivor-william-petit-repeal-connecticut-death/story?id=16072574> [https://perma.cc/S9BM-WEGK]; Mary Ellen Godin, *Connecticut Senate Votes to Repeal Death Penalty in State*, REUTERS (Apr. 5, 2012), <https://www.reuters.com/article/us-usa-deathpenalty-connecticut/connecticut-senate-votes-to-repeal-death-penalty-in-state-idUSBRE83406N20120405> [https://perma.cc/C4Z8-5UUS].

In New Hampshire, where legislative repeal of the death penalty took effect May 30, 2019, much debate centered on the fate of the single offender under sentence of death, Michael Addison. See Evan Allen, *As N.H. Considers Repealing the Death Penalty, the Lone Man on Death Row Looms Large*, BOST. GLOBE (May 17, 2019), <https://www.bostonglobe.com/metro/2019/05/17/considers-repealing-death-penalty-lone-man-death-row-looms-large/00KkWffEcsmba4Lmq2cRJ/story.html> [https://perma.cc/BW3C-VLHC].

Similar controversy ensued in Colorado, where three offenders were under sentence of death while debate about repealing Colorado's death penalty law unfolded. When Governor Jared Polis signed repeal legislation on March 23, 2020, he commuted the offenders' death sentences to life imprisonment without parole. See Valerie Richardson, *'Polis Hijacks Justice': Democrat Loses Fight*

controversial. For example, in 2016, California voters were asked to decide through a ballot initiative whether the state's death penalty should be eliminated and replaced with life imprisonment without parole.¹² The fate of the state's nearly 750 death row inmates hung in the balance,¹³ because the measure was expressly made retroactive.¹⁴ The proposition narrowly failed,¹⁵ leaving the previously imposed death sentences undisturbed. At the other end of the death row spectrum, when New Hampshire repealed its capital punishment law in 2019,¹⁶ the measure's prospective application left the death sentence of the lone offender awaiting execution unaffected.¹⁷

to Keep Son's Killers on Death Row in Colorado, WASHINGTON TIMES (Mar. 25, 2020), <https://www.washingtontimes.com/news/2020/mar/25/jared-polis-colorado-death-penalty-repeal-blasted/> [https://perma.cc/CG7J-7893]; Neil Vidor, *Colorado Abolishes Death Penalty and Commutes Sentences of Death Row Inmates*, N.Y. TIMES (Mar. 23, 2020), <https://www.nytimes.com/2020/03/23/us/colorado-death-penalty-repeal.html> [https://perma.cc/CEA8-DSAE]. See *Colo. Exec. Orders, infra* notes 60 & 61 and accompanying text.

See also Kevin Barry, *From Wolves, Lambs (Part I): The Eighth Amendment Case for Gradual Abolition of the Death Penalty*, 66 FLA. L. REV. 313, 315–25 (2014) [hereinafter Barry I].

12. The full text of the ballot initiative was styled as the Justice That Works Act of 2016 and presented to the voters in California as Proposition 62. Mike Farrell, *Justice That Works Act of 2016*, OFF. OF THE CAL. ATT'Y GEN. (Sept. 15, 2015), <https://www.oag.ca.gov/system/files/initiatives/pdfs/15-0066%20%28Death%20Penalty%29.pdf> [https://perma.cc/A562-VY78].

13. On October 1, 2016, 745 individuals were under sentence of death in California. See Deborah Fins, *Death Row U.S.A. Fall 2016*, NAACP LEGAL DEF. & EDUC. FUND, INC. (Oct. 1, 2016), 1, 39–45, <https://www.naacpldf.org/wp-content/uploads/DRUSAFall2016.pdf> [https://perma.cc/4WXU-XQL6].

14. Farrell, *supra* note 12, provided in part:
SEC. 10. Retroactive Application of Act

- (a) In order to best achieve the purpose of this act as stated in Section 3 and to achieve fairness, equality and uniformity in sentencing, this act shall be applied retroactively.
- (b) In any case where a defendant or inmate was sentenced to death prior to the effective date of this act, the sentence shall automatically be converted to imprisonment in the state prison for life without the possibility of parole under the terms and conditions of this act. The State of California shall not carry out any execution following the effective date of this act. . . .

15. Voters rejected the proposition by a margin of 53.15% to 46.85%. See *California Proposition 62, Repeal of the Death Penalty*, BALLOTPEDIA, [https://ballotpedia.org/California_Proposition_62,_Repeal_of_the_Death_Penalty_\(2016\)](https://ballotpedia.org/California_Proposition_62,_Repeal_of_the_Death_Penalty_(2016)) [https://perma.cc/5BY2-2FJ5]; *California Proposition 62 — Repeal Death Penalty — Results: Rejected*, N.Y. TIMES (Aug. 1, 2017), <https://www.nytimes.com/elections/2016/results/california-ballot-measure-62-repeal-death-penalty> [https://perma.cc/8QKS-N8M4].

16. N.H. REV. STAT. ANN. § 630:1, III (2019). See *infra* note 148 and accompanying text.

17. See Mark Berman, *New Hampshire Abolishes Death Penalty After Lawmakers Override Governor*, WASH. POST (May 30, 2019), https://www.washingtonpost.com/national/new-hampshire-will-abandon-death-penalty-after-lawmakers-override-governor/2019/05/30/d0bdec8e-824c-11e9-bcc7-40b4105f7ca0_story.htm [https://perma.cc/T226-3EYD] (noting that the death sentence of Michael

When the repeal of capital punishment legislation is under consideration, not only is the abstract proposition of whether the death penalty should be abandoned or retained at issue, but also whether the death sentences lawfully imposed on past offenders for their very real and often heinous murders—crimes that have claimed the lives of identifiable victims and irretrievably altered the lives of victims’ survivors¹⁸—would, should, or must be rendered nullities and replaced with life imprisonment.¹⁹ Parsing the moral,²⁰ legal,²¹ political,²² and philosophical²³ dimensions of these questions, which must inevitably be confronted in active death-penalty jurisdictions, is fraught with complexities. For instance: Would executing offenders under sentence of death for their previously committed crimes following the repeal of death penalty legislation continue to be justified (or demanded) in the name of retribution?²⁴ Could executing previously sentenced murderers possibly

Addison, the only person under sentence of death in New Hampshire, remained undisturbed, although Addison did not face imminent execution). See *infra* notes 150–153 and accompanying text.

18. See generally WOUNDS THAT DO NOT BIND: VICTIM-BASED PERSPECTIVES ON THE DEATH PENALTY (James R. Acker & David Karp, eds., 2006).

19. “‘When we talk about the death penalty in the abstract, there’s a growing movement toward abolition because of concerns about fairness, accuracy, discrimination, and cruelty,’ Northeastern University law professor Daniel Medwed said. ‘But on a granular level, in an individual case, it gets complicated.’” Allen, *supra* note 11.

20. See Barry I, *supra* note 11, at 332–36.

21. *Id.* at 336–85; see generally Kevin Barry, *From Wolves, Lambs (Part II): The Fourteenth Amendment Case for Gradual Abolition of the Death Penalty*, 35 CARDOZO L. REV. 1829 (2014) [hereinafter Barry II].

22. See Kevin Barry, *Going Retro: Abolition for All*, 46 LOY. U. CHI. L.J. 669, 674 (2015) (“The primary reason why states are repealing [death-penalty laws] prospectively only is, not surprisingly, political.”).

23. Immanuel Kant’s views on capital punishment include the oft-cited passage: “Even if a civil society were to dissolve itself by common agreement of all its members (for example, if the people inhabiting an island decide to separate and disperse themselves around the world), the last murderer remaining in prison must first be executed, so that everyone will duly receive what his actions are worth and so that the bloodguilt thereof will not be fixed on the people because they failed to insist on carrying out the punishment; for if they fail to do so, they may be regarded as accomplices in this public violation of legal justice.” IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 102 (John Ladd trans. Hackett Publishing Company, Inc. 2d ed. 1999). See Don E. Scheid, *Kant’s Retributivism*, 93 ETHICS 262, 279 (1983). For other philosophical perspectives on the death penalty in general, see Tom Sorell, *Aggravated Murder and Capital Punishment*, 10 J. APPLIED PHIL. 201 (1993); see generally David Heyd, *Hobbes on Capital Punishment*, 8 HIST. PHIL. Q. 119 (1991).

24. A majority of the Supreme Court in *State v. Santiago*, 122 A.3d 1 (Conn. 2015) answered this question in the negative, drawing a contrast between public retribution and private vengeance:

Finally, it bears emphasizing that, to the extent that the statutory history of P.A. 12-5 [the repealed legislation] reveals anything with respect to the legislature’s purpose in prospectively abolishing the death penalty while retaining it for the handful of individuals now on death row, it is that the primary rationale for this dichotomy was neither deterrence nor retribution but, rather, vengeance—the Hyde to retribution’s Jekyll. Vengeance, unlike retribution, is personal in nature; it is motivated by emotion, and may even relish in the

have general deterrence value in a post-repeal era, when the death penalty no longer is a threatened punishment?²⁵ Would executing offenders under

suffering of the offender. Accordingly, vengeance traditionally has not been considered a constitutionally permissible justification for criminal sanctions. See *Ford v. Wainwright*, 477 U.S. 399, 410 (1986) (finding no retributive value in “the barbarity of exacting mindless vengeance”). On the contrary, “[i]t is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.” *Gardner v. Florida*, 430 U.S. 349, 358 (1977) (plurality opinion).

There are, no doubt, cases in which the line between a principled commitment to retributive justice and an impermissible acquiescence to private vengeance is a gray one. There is every indication, however, that P.A. 12-5 was crafted primarily to maintain the possibility of executing two particular offenders—the much reviled perpetrators of the widely publicized 2007 home invasion and murder of three members of Cheshire’s Petit family.

Id. at 71–72 (citation and footnote omitted). See also *id.* at 173 (Eveleigh, J., concurring) (“Vengeance has no place in the orderly administration of justice by a civilized society. It certainly can never serve as the justification for the death penalty in today’s world. My review of the text and legislative history of the public act under consideration, No. 12-5 of the 2012 Public Acts (P.A. 12-5), leads me to the inescapable conclusion that vengeance was the motivating factor underlying the enactment of the provisions allowing the eleven men on death row to be executed while eliminating the death penalty for crimes committed in the future.”). But see Barry I, *supra* note 21, at 371–73; Robert Blecker, *Death is Only Justice*, N.Y. POST (Mar. 30, 2011), <https://nypost.com/2011/03/30/death-is-only-justice> [<https://perma.cc/3UNE-G53M>].

25. Considering this question in *State v. Santiago*, 122 A.3d 1, 57 (Conn. 2015), the Connecticut Supreme Court had no difficulty concluding that the death penalty could have no possible deterrent value following repeal of the capital punishment statute:

Turning first to deterrence, we observe that it is clear that, with the passage of P.A. 12-5 [the repealed legislation], any deterrent value the death penalty may have had no longer exists. As Justice Harper explained in his dissent in *Santiago I*: “The ultimate test of this deterrence claim is whether the state, by executing some of its citizens, better achieves the unquestionably legitimate goal of discouraging others from committing similar crimes. As a general matter, the empirical evidence regarding deterrence is inconclusive. Following the abolition of the death penalty for all future offenses committed in Connecticut, however, it is possible to determine the exact number of potential crimes that will be deterred by executing the defendant in this case. That number is zero.” (Emphasis omitted; footnote omitted.) *State v. Santiago*, [49 A.3d 566, 700 (Conn. 2012)] (Harper, J., concurring in part and dissenting in part).

While conceding that the argument that executing offenders following legislative repeal of the death penalty would operate as a deterrent for future prospective murderers “is a somewhat harder case” than finding continuing retributive value, Professor Barry nevertheless has offered an argument:

How, one might ask, can the death penalty deter future offenders if no future offender will ever be put to death? The answer is that by imposing the death penalty against those currently on death row, prospective-only repeal “communicate[s] to all criminals that they will be held to account for their crimes in the manner in which the law provides when they commit them.” Through prospective-only repeal, the legislature is making absolutely clear to future offenders that it means what it says—that they should be under no illusion that a change in law tomorrow will spare them the consequences of their actions today. Offenders sentenced to death will not benefit from the subsequent repeal of the death penalty, any more than future offenders sentenced to life in prison without the possibility of parole (LWOP) will benefit from some yet-to-be-enacted repeal of LWOP down the

sentence of death after repeal legislation is enacted heighten the arbitrariness of capital sentencing practices to impermissible levels, in that otherwise indistinguishable offenders who commit otherwise indistinguishable crimes are spared the risk of execution simply because the death penalty is no longer in effect?²⁶

Questions of this nature are important and demand attention; however, the thrust of this Article lies elsewhere. The focus is not on normative considerations, including the justice or fairness of executing offenders who are under sentence of death at the time death-penalty legislation is repealed or invalidated. Nor do we dwell on utilitarian considerations such as whether measurable costs or benefits of carrying out executions following repeal or invalidation of the death penalty will likely ensue. The current objective is more modest. Rather than explore what *should* happen, our goal is to document what *has* happened historically to offenders who are on death row, awaiting execution, at the time capital punishment laws are repealed or judicially invalidated. In addition to embodying the political, ethical, and prudential judgments made over time, past practices regarding whether executions have been carried out in jurisdictions after sentences of death are no longer

road. “Future offenders beware,” the legislature is saying. “You get what we say you get, not what we say as modified by what we haven’t said yet (in future legislation).”

Barry I, *supra* note 11, at 373–74 (footnotes and citation omitted).

26. See *State v. Santiago*, 122 A.3d 1, 128 (Conn. 2015) (Eveleigh, J., concurring):

[T]he arbitrariness in the present case stems from the effective date provision of the act, which, in effect, renders the date on which a defendant commits his crime an eligibility factor for the death penalty. I fail to see how this scheme, which permits the imposition of the death penalty for a capital felony committed at any time prior to 11:59 p.m. on April 24, 2012, but rejects categorically the imposition of the death penalty for the same conduct or even substantially more heinous acts carried out two minutes later, is in any way distinct from the constitutionally infirm schemes rejected by the United States Supreme Court in *Furman v. Georgia*, 408 U.S. 238 (1972)]. The circumstances that I describe strike me as exactly the sort of wanton and freakish imposition of the death penalty that runs afoul of the eighth amendment of the United States constitution.

See *also id.* at 111–12. *But see* Barry I, *supra* note 11, at 381–82 (footnote omitted):

Because the legislature’s decision to repeal a law has nothing to do with a jury’s decision to sentence a person to death, and has everything to do with the separation of powers between the judicial and legislative branches, *Furman* is inapplicable to prospective-only repeal. As the Court in *Gregg v. Georgia*, 428 U.S. 153, 195 (1976) (plurality opinion) made clear, if “the sentencing authority is apprised of the information relevant to the imposition of [a] sentence and provided with standards to guide its use of the information,” the risk of an arbitrary and capricious sentence in violation of the Eighth Amendment is removed. The sentence does not suddenly become arbitrary and capricious because the legislature decides to repeal the death penalty prospective-only at some later date. In short, *Furman* concerns whether a jury’s sentence of death was arbitrary and capricious, not whether a state’s eventually carrying out that sentence might be.

See *generally id.* at 378–83.

authorized are directly relevant to the Supreme Court's determination of whether, as applied, the death penalty violates the Eighth Amendment's prohibition against cruel and unusual punishments.

Perhaps surprisingly, death-penalty repeals, and occasionally cycles of repeal and reinstatement, have occurred with some frequency over time, and in many jurisdictions. Ascertaining what has happened historically to offenders awaiting execution at the time capital punishment laws have been repealed or invalidated is of immediate interest to one aspect of the Supreme Court's death penalty jurisprudence. While giving content to the Eighth Amendment's prohibition against cruel and unusual punishments, the justices have consistently "been guided by 'objective indicia,' . . . [including] state practice with respect to executions,"²⁷ to help determine whether capital punishment policies are consistent with "the evolving standards of decency that mark the progress of a maturing society."²⁸

The initial section of this Article examines jurisdictions within the United States that have transitioned from authorizing capital punishment to abandoning it, either temporarily or permanently, to determine whether offenders who were under sentence of death at the time of legislative repeal or judicial invalidation have been executed.²⁹ The next section

27. *Kennedy v. Louisiana*, 554 U.S. 407, 421 (2008) (quoting *Roper v. Simmons*, 543 U.S. 551, 563 (2005)).

28. Chief Justice Warren's plurality opinion in *Trop v. Dulles*, 356 U.S. 86, 101 (1958), observed that "[t]he [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." The plurality opinion in *Gregg v. Georgia*, 428 U.S. 153, 173 (1976), endorsed this principle while rejecting the argument that the Eighth Amendment prohibits capital punishment for aggravated murder. In doing so, the justices relied in part on juries' sentencing practices, noting that "the actions of juries in many States since *Furman* [*v. Georgia*, 408 U.S. 238 (1972)] are fully compatible with the legislative judgments, reflected in the new statutes, as to the continued utility and necessity of capital punishment in appropriate cases. At the close of 1974 at least 254 persons had been sentenced to death since *Furman*, and by the end of March 1976, more than 460 persons were subject to death sentences." *Id.* at 182 (plurality opinion). In later cases, the justices have looked to execution practices while resolving Eighth Amendment challenges in contexts including whether capital punishment is permissible for the crime of raping an adult (*Coker v. Georgia*, 433 U.S. 584, 596–97 (1977) (plurality opinion)) or a child (*Kennedy v. Louisiana*, 554 U.S. 407, 433–34 (2008)); for juvenile offenders (*Thompson v. Oklahoma*, 487 U.S. 815, 832–33 (1988) (plurality opinion); *Id.* at 852–53 (O'Connor, J., concurring in the judgment); *Stanford v. Kentucky*, 492 U.S. 361, 373–74 (1989); *Roper v. Simmons*, 543 U.S. 551, 564–65 (2005)); for intellectually disabled offenders (*Atkins v. Virginia*, 534 U.S. 304, 316 (2002)); and for offenders convicted of felony murder who did not personally kill their victim (*Enmund v. Florida*, 458 U.S. 782, 794–95 (1982)).

29. The information provided in this section relies in part on the Brief of Amici Curiae, Legal Historians & Scholars, *Connecticut v. Santiago*, 305 Conn. (filed Dec. 2, 2012). Brian W. Stull authored this brief, with the assistance of Alex V. Hernandez. The Legal Historians and Scholars supporting the brief included Professors James R. Acker, Stuart Banner, William J. Bowers, Dr. Scott Christianson, David Garland, James S. Liebman, Michael Meltsner, Richard Moran, Michael L.

offers analogous information about international practices, with specific attention given to the Canadian and British experiences. The last section explores whether any 16- or 17-year-old offenders were executed in states that raised the minimum age of death-penalty eligibility to 18 after their death sentences were imposed, but before the Supreme Court ruled in 2005 that the Eighth Amendment prohibits the capital punishment of offenders younger than 18.³⁰

In short, these investigations have uncovered no cases in which executions have gone forward under those circumstances.

II. HISTORICAL PRACTICES IN THE UNITED STATES

Several jurisdictions within the United States have abandoned capital punishment, either permanently or temporarily, following a period when death-penalty laws were in effect and utilized. We first identify those jurisdictions and the years in which they did and did not authorize capital punishment. We then summarize the execution practices in those jurisdictions during the times that their death-penalty laws were no longer in effect.

A. *American Jurisdictions Which Have Repealed or Judicially Invalidated their Death-Penalty Laws*

The following American jurisdictions do not currently authorize capital punishment because they have repealed or courts have invalidated their death-penalty laws:

Alaska (repeal March 30, 1957)
 Colorado (repeal July 1, 2020)
 Connecticut (repeal April 25, 2012)
 Delaware (judicial invalidation Aug. 2, 2016)
 District of Columbia (repeal Feb. 26, 1981)
 Hawaii (repeal June 5, 1957)

Radelet, Austin Sarat, and Franklin E. Zimring. In *State v. Santiago*, 122 A.3d 1 (Conn. 2015), the Connecticut Supreme Court invalidated Connecticut's death penalty on state constitutional grounds and also invalidated the sentences of all offenders then on the state's death row. See also M. Watt Espy & John Ortiz Smykla, *Executions in the United States, 1608-2002: The Espy File*, INTER-U. CONSORTIUM FOR POL. & SOC. RES. (Jul. 20, 2016), <https://www.icpsr.umich.edu/icpsrweb/NACJD/studies/8451> [<https://perma.cc/Q8XA-Q97W>] [hereinafter ICPSR: *The Espy File*]; M. Watt Espy, *M. Watt Espy Papers, 1730-2008*, U. AT ALB., NAT'L DEATH PENALTY ARCHIVE, <https://archives.albany.edu/description/catalog/apap301> [<https://perma.cc/DLS2-HRVQ>]; DEATH PENALTY INFO. CTR. (Dec. 16, 2020), <https://deathpenaltyinfo.org/> [<https://perma.cc/JRG3-P4CK>].

30. *Roper v. Simmons*, 543 U.S. 551 (2005).

Illinois (repeal July 1, 2011)
 Iowa (repeal July 4, 1965)
 Maine (repeal March 17, 1887)
 Maryland (repeal Oct. 1, 2013)
 Massachusetts (judicial invalidation Oct. 18, 1984)
 Michigan (repeal March 1, 1847)
 Minnesota (repeal April 22, 1911)
 New Hampshire (repeal May 30, 2019)
 New Jersey (repeal Dec. 17, 2007)
 New Mexico (repeal July 1, 2009)
 New York (judicial invalidation Oct. 23, 2007)
 North Dakota (repeal March 19, 1915)
 Rhode Island (repeal Feb. 11, 1852)³¹
 Vermont (repeal Apr. 15, 1965)
 Virginia (repeal July 1, 2021)
 Washington (judicial invalidation Oct. 11, 2018)
 West Virginia (repeal June 18, 1965)
 Wisconsin (repeal July 12, 1853)³²

The following states repealed capital punishment laws in the pre-*Furman*³³ era and later reinstated them:

Arizona (repeal Dec. 8, 1916, reinstated Dec. 5, 1918)
 Colorado (repeal June 29, 1897, reinstated July 31, 1901)
 Delaware (repeal Apr. 2, 1958, reinstated Dec. 18, 1961)
 Iowa (repeal May 1, 1872, reinstated May 26, 1878)
 Kansas (repeal Jan. 30, 1907, reinstated March 11, 1935)
 Maine (repeal Feb. 21, 1876, reinstated March 13, 1883)
 Missouri (repeal Apr. 13, 1917, reinstated July 8, 1919)
 New Mexico (partial repeal March 31, 1969, reinstated March 30,
 1979)
 New York (partial repeal June 1, 1965, reinstated March 7, 1995)

31. Following its repeal of the death penalty in 1852, the Rhode Island legislature reinstated capital punishment for murder committed by a life-term prisoner in 1872. That provision was never used and was rendered unconstitutional by virtue of the Supreme Court's ruling in *Furman v. Georgia*, 408 U.S. 238 (1972). Legislation was enacted in 1973 which mandated capital punishment for murder committed by a prisoner. This provision was ruled unconstitutional in 1979. See *infra* note 211 and accompanying text.

32. Considerable information about state death-penalty laws and practice is available at *State by State*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state> [<https://perma.cc/98UX-2FUZ>].

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

Oregon (repeal Dec. 3, 1914, reinstated May 21, 1920; repeal Nov. 30, 1964, reinstated Dec. 7, 1978)

South Dakota (repeal Feb. 15, 1915, reinstated Jan. 27, 1939)

Tennessee (partial repeal March 27, 1915, (for murder, but not for rape or for murder committed by life term prisoner), reinstated for murder Jan. 27, 1919)

Washington (repeal March 22, 1913, reinstated March 14, 1919)³⁴

B. Execution Practices in Jurisdictions Following Legislative Repeal or Judicial Invalidation of Death-Penalty Statutes

The execution practices within jurisdictions that have legislatively repealed or judicially invalidated their capital punishment laws are detailed below.

1. Alaska

Legislative repeal March 30, 1957

No executions following 1957 repeal

Twelve executions were carried out in Alaska during its territorial days,³⁵ the first in 1869 and the last on April 4, 1950.³⁶ The Alaska Territorial Legislature abolished capital punishment in 1957, enacting a measure which stated: “The death penalty is and shall hereafter be abolished as punishment in Alaska for the commission of any crime.”³⁷

34. *State by State*, *supra* note 32.

35. Alaska became a state in 1959 and entered the union as the 49th state on January 3, 1959. *Alaska's History*, ALASKA PUB. LANDS INFO. CENTS., <https://www.alaskacenters.gov/explore/culture/history> [<https://perma.cc/H9NC-WJUL>].

36. ICPSR: *The Espy File*, *supra* note 29, at Alaska, V16(2), V14. The last person executed in Alaska was Eugene LaMoore, who was hanged April 14, 1950. *Id.* See also JOHN F. GALLIHER, LARRY W. KOCH, DAVID PATRICK KEYS & TERESA J. GUESS, *AMERICA WITHOUT THE DEATH PENALTY: STATES LEADING THE WAY* 123 (Northeastern U. Press 2002); *Executions in the U.S. 1608-2002: The ESPY File Executions by State*, DEATH PENALTY INFORMATION CENTER 1, <https://files.deathpenaltyinfo.org/legacy/documents/ESPYstate.pdf> [<https://perma.cc/UJM5-7MPU>] [hereinafter “DPIC, *Executions in the U.S.*”]; Melissa S. Green, *The Death Penalty in Alaska*, 25 ALASKA JUST. F. 11 (2009).

37. Green, *supra* note 36; Averil Lerman, *Capital Punishment in Territorial Alaska: The Last Three Executions*, 9 FRAME OF REFERENCE 6, 16–19 (1998); GALLIHER ET AL., *supra* note 36, at 124 & n. 34 (citing Territory of Alaska: Session Laws, Resolutions, and Memorials, *Laws of Alaska* (30 March 1957), ch. 132, at 263).

Capital punishment has not been authorized since,³⁸ and no executions were conducted in the state after 1950, including the post-repeal period.³⁹

2. Arizona

Legislative repeal Dec. 8, 1916

No executions following repeal through reinstatement

Legislative reinstatement Dec. 5, 1918

First post-repeal execution April 16, 1920

The last of three executions conducted in Arizona in 1916 took place when Miguel Peralta was hanged on July 7.⁴⁰ Almost exactly five months later, on December 8, 1916, a voter initiative became effective which abolished the state's death penalty.⁴¹ The state reenacted death-penalty legislation through a referendum just two years later, with reinstatement

38. *State by State*, *supra* note 32 (identifying Alaska as a state without the death penalty); *Thompson v. Oklahoma*, 487 U.S. 815, 826 n. 25 (1988) (plurality opinion) (identifying Alaska as a state that does not authorize capital punishment, and citing Territory of Alaska, Session Laws, 1957, ch. 132, 23d Sess., an Act abolishing the death penalty for the commission of any crime; see ALASKA STAT. ANN. § 12.55.015 (West 1987) (“Authorized sentences” do not include the death penalty; § 12.55.125, Sentences of imprisonment for felonies” do not include the death penalty). ALASKA STAT. ANN. § 12.55.015 (1987) (“Authorized sentences” do not include the death penalty; § 12.55.125, “Sentences of imprisonment for felonies” do not include the death penalty).

39. See *Execution Database (Alaska)*, DEATH PENALTY INFO. CENT., <https://deathpenaltyinfo.org/executions/execution-database?filters%5Bstate%5D=Alaska> [https://perma.cc/5AJ6-36BS] (no executions in Alaska in database chronicling executions in the United States 1977 to present); Green, *supra* note 36.

40. DPIC, *Executions in the U.S.*, *supra* note 36, at 39; *Executions Prior to 1992 & Execution Methods*, ARIZ. DEPT. OF CORRECTIONS, <https://corrections.az.gov/public-resources/death-row/executions-prior-1992-execution-methods> [https://perma.cc/XQ6S-J446]. See also ICPSR: *The Espy File*, *supra* note 29, at Arizona, V16(4), V14.

41. *Arizona Death Penalty History*, ARIZ. DEPT. OF CORR., <https://corrections.az.gov/public-resources/death-row/arizona-death-penalty-history> [https://perma.cc/65WZ-X64K]; John F. Galliher, Gregory Ray, & Brent Cook, *Abolition and Reinstatement of Capital Punishment During the Progressive Era and Early 20th Century*, 83 J. CRIM. L. & CRIMINOLOGY 538, 552 (1992). See *Ex parte Faltin*, 254 P. 477, 478 (Ariz. 1927) (quoting the initiative measure:

Be it enacted by the people of the state of Arizona:

Section 1. That paragraph 173, chapter I, title VIII, Penal Code, of the Revised Statutes of Arizona, 1913 [authorizing punishment of death for murder in the first degree], be and the same is hereby amended so as to read as follows:

173. Every person guilty of murder in the first degree shall suffer imprisonment for life, and every person guilty of murder in the second degree shall be confined in the State Prison for not less than ten years. No person convicted of the crime of murder shall be recommended for pardon, commutation or parole by the board of pardons and paroles except upon newly discovered evidence establishing to the satisfaction of all the members of said board his or her innocence of the crime for which conviction was secured.

Sec. 2. All acts and parts of acts in conflict with this act are hereby repealed.)

taking effect December 5, 1918.⁴² The first post-repeal execution occurred April 16, 1920, when Simplicio Torrez was hanged for a murder committed May 1, 1919.⁴³ In January 1917, the Arizona Pardon Board commuted the sentences of prisoners who were on death row when the repeal legislation became effective.⁴⁴ One inmate, William Faltin, had been sentenced to death in 1913 for a murder committed in 1912. He was found “insane,” or incompetent for execution, in December 1915 and retained that status when the repeal legislation went into effect in December 1916. He was certified as “sane” in August 1917, and remained in prison at the time he sought release in 1927 through a writ of habeas corpus. In denying his release, the Arizona Supreme Court further declined to invalidate his death sentence or rule that a sentence of life imprisonment should be substituted. The court reasoned that the repeal legislation had not invalidated the death sentence originally imposed in 1913, and that because the death penalty had been reinstated in 1918, there

42. The reinstatement measure restored the law as it existed prior to repeal, and provided: “Every person guilty of murder in the first degree shall suffer death or imprisonment in the territorial prison for life, at the discretion of the jury trying the same, or, upon the plea of guilty, the court shall determine the same; and every person guilty of murder in the second degree is punishable by imprisonment in the territorial prison not less than ten years.” *Ex parte Faltin*, 254 P. 477, 477 (Ariz. 1927) (quoting the initiative measure and prior legislation); *Arizona Death Penalty History*, *supra* note 41.

The short period of abolition was decisively repudiated by the voters, a result apparently fueled in part by highly publicized killings committed by individuals who purportedly boasted that without a death penalty they could commit murder without being unduly concerned about the consequences. Galliher, et al., *supra* note 41, at 562–64.

43. *Executions Prior to 1992 & Execution Methods*, ARIZ. DEPT. OF CORR., <https://corrections.az.gov/public-resources/death-row/executions-prior-1992-execution-methods> [<https://perma.cc/XB27-63TNJ>]; *Documentation for the Execution of Simplicio Torrez, 1920-04-16*, U. ALBANY NAT’L DEATH PENALTY ARCHIVE, <https://archives.albany.edu/concern/daos/gb19f98m?locale=en#c=0&m=0&s=0&cv=0&xywh=-2081%2C1203%2C7573%2C4868> [<https://perma.cc/MNG9-X9X5>] [hereinafter DEATH PENALTY ARCHIVE].

44. Shortly after repeal of Arizona’s death penalty law, in 1917, the Arizona Pardon Board commuted the death sentences of prisoners remaining on death row. *Arizona’s Death Penalty: A Chronological History*, ARIZONA SHERIFF, Mar. 1977 (reproducing prior news articles, including *Hangings Abolished*, PHOENIX MESSENGER, Jan. 13, 1917 (noting commutations)).

The Arizona Department of Corrections, Rehabilitation and Reentry, maintains an Historical Prison Register. *Historical Prison Register*, THE ARIZ. DEP’T OF CORRS., REHAB. & REENTRY (2020), <https://corrections.az.gov/historical-prison-register-d#Bac-El-Cle> [<https://perma.cc/R7Y7B-FM35>] ((A-D) and thereafter for surnames (E-I, J-L, M-S, and T-Z)). The records indicate when prisoners were received on death row and when and how they left death row. Inspection of those records reveals no inmates who were received on death row before the repeal legislation went into effect on Dec. 6, 1916 were executed thereafter; all were subsequently released, died in prison, or no release date is indicated.

existed no barrier to carrying it out.⁴⁵ The following year, in 1928, Faltin's sentence was commuted to life imprisonment.⁴⁶

In 2019, Arizona's capital sentencing law was amended by removing three aggravating factors from prior law that designated what types of murder were death-penalty eligible, and narrowing a fourth aggravating factor.⁴⁷ The full extent of the consequences of this narrowing are currently unknown, but, in a ruling likely to be reviewed by the Arizona Supreme Court, a trial court has recently vacated a death sentence supported only by an aggravating circumstance that no longer exists.⁴⁸

45. *Ex parte Faltin*, 254 P. 477, 477 (Ariz. 1927).

46. Faltin's death sentence was commuted to life and he died of natural causes in prison. *Life Terners Skip in the Night*, PRESCOTT EVENING COURIER, Dec. 28, 1939, at 1, 8 ("In 1928, [Faltin's death] sentence was commuted to life imprisonment by the parole board."). See also *Historical Prison Register* [E-I], THE ARIZ. DEP'T OF CORRS., REHAB. & REENTRY (2020), <https://corrections.az.gov/historical-prison-register-e-i> [<https://perma.cc/BJD4-D5RB>] (indicating that William Faltin was received in prison Apr. 15, 1913, and remained confined until he died Jan. 15, 1953).

47. The aggravating factors making murder death penalty-eligible under current Arizona law are itemized in ARIZ. REV. STAT. § 13-751 (F) (LexisNexis 2019). The three aggravating factors eliminated from prior law, ARIZ. REV. STAT. § 13-751 (F) (LexisNexis 2012) are (F)(3) "In the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the person murdered during the commission of the offense," (F)(13) "The offense was committed in a cold, calculated manner without pretense of moral or legal justification," and (F)(14) "The defendant used a remote stun gun or an authorized remote stun gun in the commission of the offense." See Dillon Rosenblatt, *GOP Bill Scales Back Death Penalty Eligibility*, ARIZ. CAPITOL TIMES (Feb. 22, 2019), <https://azcapitoltimes.com/news/2019/02/22/gop-bill-scales-back-death-penalty-eligibility/> [<https://perma.cc/DG3G-NSXP>] ("Dale Baich, who heads the capital habeas unit of the Federal Public Defender's Office in Arizona, said the latter two aggravators are used very infrequently, which is why the bill would eliminate them; the first is used more often."). In addition to eliminating these three aggravating factors, the legislation substantially narrowed the "pecuniary gain" aggravating circumstance under (F)(5), making it now applicable only in "murder-for-hire" circumstances. Compare ARIZ. REV. STAT. § 13-751 (F) (5) (LexisNexis 2012) ("The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.") with ARIZ. REV. STAT. § 13-751 (F) (3) (LexisNexis 2019) ("The defendant procured the commission of the offense by payment or promise of payment, of anything of pecuniary value, or the defendant committed the offense as a result of payment, or a promise of payment, of anything of pecuniary value.").

48. In *State v. Greene*, Order, No. CR-21-0082-PC (Pima Co. Sup. Ct. Feb. 2, 2021), a superior court judge vacated the death sentence of Beau John Greene. This was because Greene's death sentence had only been supported by the former pecuniary-value aggravator set out in ARIZ. REV. STAT. § 13-751 (F) (5) (LexisNexis 2012), but was not factually supported under the narrowed version of the aggravator that contemplates murder-for-hire scenarios. The State of Arizona has petitioned the Arizona Supreme Court to review this lower-court decision. See *State's Pet. For Review, State v. Greene*, 2021 WL 2368153 (March 4, 2021). Greene had originally been sentenced to death based on an additional aggravating factor – that his killing was especially heinous, cruel, or depraved. *State v. Greene*, 967 P.2d 106, 114–116 (Ariz. 1998). The Arizona Supreme Court, however, found the evidence of that aggravator insufficient. *Id.* One reason the consequences and reach of the 2019 narrowing remains uncertain is that in many cases, unlike Greene's, additional still-valid aggravating circumstances will remain.

3. Colorado

Legislative repeal June 29, 1897

No executions following repeal through legislative reinstatement

Legislative reinstatement July 31, 1901

First post-repeal execution March 6, 1905

Legislative repeal July 1, 2020

The last three executions conducted in Colorado prior to the State's 1897 repeal of its death-penalty law took place on the same day, June 26, 1896.⁴⁹ Governor Alva Adams signed the repeal bill March 29, 1897 and the legislation became effective 90 days later, on June 29. The statute abolishing capital punishment and providing for life imprisonment for murder was explicitly prospective in its terms. It provided that, "Any murder which shall have been committed before this Act takes effect shall be inquired of, prosecuted, and punished in accordance with the law in force at the time such murder was committed."⁵⁰ Governor Adams, however, commuted the death sentences of five men who, though sentenced to death very near the time of the repeal (either before or after), were not protected by the repeal because their crimes took place before it went into effect. Thus, in April 1897, after the repeal bill was signed but before the legislation took effect, he commuted the death sentences of two men convicted of murder and sentenced to death in 1896.⁵¹ Another offender committed murder in April 1897 and was convicted and sentenced to death in June,⁵² while two others killed their victim in 1896 and were convicted and sentenced to death in September 1897.⁵³ Governor Adams' commutations ensured that neither those who committed a capital crime before the repeal became effective nor those sentenced to death under prior law would be executed after the repeal legislation took effect.⁵⁴ Colorado reinstated capital punishment on July

49. DPIC, *Executions in the U.S.*, *supra* note 36 (executions of William Holt, Albert Noble, and Deonecio Romero); MICHAEL L. RADELET, *THE HISTORY OF THE DEATH PENALTY IN COLORADO* 202–03 (U. Press of Colorado 2017).

50. RADELET, *supra* note 49, at 42 (quoting 1897 Colo. Sess. Laws ch. 35).

51. *Id.* at 252 (discussing cases of Walter Davis and Allen Hense (or Henc) Downen).

52. *Id.* at 253 (discussing case of John (Jack) Cox).

53. *Id.* at 252–53 (discussing cases of Jose M. (J.M.) Lucero and Juan Duran).

54. *Id.* at 42–43 ("Three men were sentenced to death . . . in 1897 for murder that predated June 29, 1897—after the death penalty abolition bill was signed but before it took effect. . . . Governor Adams subsequently commuted all three death sentences.").

31, 1901.⁵⁵ The first execution carried out under the reinstated death-penalty law did not occur until March 6, 1905, when Azel Galbraith was hanged for a murder committed in 1904.⁵⁶

Colorado's contemporary, post-*Furman*⁵⁷ death-penalty law was repealed effective July 1, 2020 by virtue of a bill passed by the legislature and signed by Governor Jared Polis on March 23, 2020.⁵⁸ The repeal was explicitly prospective:

For offenses charged on or after July 1, 2020, the death penalty is not a sentencing option for a defendant convicted of a Class 1 Felony in the State of Colorado. Nothing in this section commutes or alters the sentence of a defendant convicted of an offense charged prior to July 1, 2020. This section does not apply to a person currently serving a sentence of death. Any death sentence in effect July 1, 2020 is valid.⁵⁹

Three individuals were under sentence of death when the repeal bill was signed.⁶⁰ On March 23, 2020, Governor Polis commuted the death sentences of all three men to life imprisonment without the possibility of parole. The governor explained that his commutation decision in each case was

. . . consistent with the abolition of the death penalty in the State of Colorado, and consistent with the recognition that the death penalty cannot be, and never has been, administered equitably in the State of Colorado. . . . My decision today is not a commentary on the moral or ethical implications of the death penalty in our society; rather it is a reflection of current law in Colorado, where the death penalty has been abolished.⁶¹

55. Michael L. Radelet, *Capital Punishment in Colorado: 1859-1972*, 74 U. COLO. L. REV. 885, 912 n.121 (2003) (citing 1901 Colo. Sess. Laws 153-54). See also Galliher, et al., *supra* note 41, at 560.

56. RADELET, *supra* note 49, at 203; DPIC, *Executions in the U.S.*, *supra* note 36; DEATH PENALTY ARCHIVE, *Documentation for the Execution of Azel Galbraith, 1905-03-06*, <https://archives.albany.edu/concern/daos/dj52wd72h#c=0&m=0&s=0&cv=0&xywh=-425%2C-119%2C4930%2C3169> [<https://perma.cc/Y4XH-ZCKU>].

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

58. S.B.20-100 (Colo. 2020); see COLO. REV. STAT. § 16-11-901 (2020).

59. S.B. 20-100 (Colo. 2020), *supra* note 58, § 1.

60. See Neil Vigdor, *Colorado Abolishes Death Penalty and Commutes Sentences of Death Row Inmates*, N.Y. TIMES (Mar. 23, 2020), <https://www.nytimes.com/2020/03/23/us/colorado-death-penalty-repeal.html> [<https://perma.cc/3FFY-9ZDQ>] (The 3 offenders whose death sentences were commuted were Robert Ray, Sir Mario Owens, and Nathan Dunlap).

61. Colo. Exec. Order No. C 2020 001 (Mar. 23, 2020), https://drive.google.com/drive/folders/1JxREHjhuS2VvZ3z6XK_btHIn5rHSQil [<https://perma.cc/8QKJ-3QPJ>] for Commutation of Sentence (offender 89148) [Nathan Dunlap]; Colo. Exec. Order, No. C 2020 002 (Mar. 23, 2020), <https://drive.google.com/drive/folders/>

In related decisions, the prosecutors in two capital trials that were underway when the repeal bill was signed withdrew their pursuit of death sentences, citing the governor's decision to commute the capital sentences of the three offenders on death row.⁶²

4. Connecticut

Legislative repeal April 25, 2012

Judicial invalidation of death penalty on state constitutional grounds
August 25, 2015, removing death sentences of all on death row

No post-repeal executions

Connecticut's death penalty was repealed by legislation enacted on April 25, 2012. The repeal was explicitly made prospective, applying only to crimes committed on or after the statute's enactment date.⁶³ Eleven

1JxREHjhuS2VvZ3z6XK_btHln5rHSQil [https://perma.cc/8QKJ-3QPJ] for Commutation of Sentence (offender 135951) [Sir Mario Owens]; Colo. Exec. Order No. C 2020 003 (Mar. 23, 2020), https://drive.google.com/drive/folders/1JxREHjhuS2VvZ3z6XK_btHln5rHSQil [https://perma.cc/8QKJ-3QPJ] for Commutation of Sentence (offender 133752) [Robert Ray].

62. Conor McCormick Cavanagh, *Prosecutors Drop Death Penalty Possibility in Adams County Case*, WESTWORD (Mar. 30, 2020), <https://www.westword.com/news/prosecutors-drop-possible-death-penalty-sentence-in-dearing-case-11678065> [https://perma.cc/G9MT-MG63](quoting District Attorney Dave Young, regarding the murder trial of Dreion Dearing); Shelly Bradbury, *Death Penalty Dropped in Colorado's Last Pending Capital Case*, DENVER POST (Apr. 14, 2020), <https://www.denverpost.com/2020/04/14/colorado-springs-murder-death-penalty-coronado-shooting/> [https://perma.cc/P8FD-2TBT] (concerning the murder trial of Marco Garcia-Bravo).

63. See CONN. GEN. STAT. ANN. § 53a-35a (West 2013):

Imprisonment for felony committed on or after July 1, 1981. Definite sentence. Authorized term.

(1)(A) For a capital felony committed prior to April 25, 2012, under the provisions of section 53a-54b in effect prior to April 25, 2012, a term of life imprisonment without the possibility of release unless a sentence of death is imposed in accordance with section 53a-46a, or (B) for the class A felony of murder with special circumstances committed on or after April 25, 2012, under the provisions of section 53a-54b in effect on or after April 25, 2012, a term of life imprisonment without the possibility of release

CONN. GEN. STAT. ANN. § 53a-45 (West 2012) Murder: Penalty; waiver of jury trial; finding of lesser degree.

(a) Murder is punishable as a class A felony in accordance with subdivision (2) of section 53a-35a unless it is a capital felony committed prior to April 25, 2012, punishable in accordance with subparagraph (A) of subdivision (1) of section 53a-35a, murder with special circumstances committed on or after April 25, 2012, punishable as a class A felony in accordance with subparagraph (B) of subdivision (1) of section 53a-35a, or murder under section 53a-54d.

CONN. GEN. STAT. ANN. § 53a-54e (West 2012) Construction of statutes re capital felony committed prior to April 25, 2012.

individuals were under sentence of death in the state when the repeal legislation became effective.⁶⁴ All of their sentences were vacated and replaced with sentences of life imprisonment without parole after the Connecticut Supreme Court's 2015 ruling in *State v. Santiago* that capital punishment violated the state constitution.⁶⁵ The decision specifically held that offenders under sentence of death prior to the repeal statute's taking effect could not be executed and that the legislature's directive that abolition of the death penalty was prospective only was constitutionally invalid.⁶⁶ Connecticut's last execution was carried out May 13, 2005.⁶⁷ No executions were conducted following the 2012 legislative repeal of the state's capital punishment law.⁶⁸

The provisions of subsection (t) of section 1-1 and section 54-194 shall apply and be given full force and effect with respect to a capital felony committed prior to April 25, 2012, under the provisions of section 53a-54b in effect prior to April 25, 2012.

64. See *Death Row U.S.A.*, NAACP LEGAL DEF. & EDUC. FUND, INC., https://www.naacpldf.org/wp-content/uploads/DRUSA_Summer_2012.pdf [<https://perma.cc/Q6CR-P4DV>] (Page 47 indicates that 11 individuals were under sentence of death in Connecticut on July 1, 2012); *Death Row U.S.A.*, NAACP LEGAL DEF. & EDUC. FUND, INC., https://www.naacpldf.org/wp-content/uploads/DRUSA_Spring_2012.pdf [<https://perma.cc/UUX3-7C5B>] (Page 48 indicates that the same 11 individuals under sentence of death in Connecticut on April 1, 2012). The 11 offenders then under sentence of death in Connecticut were Lazale Ashby, Robert Breton, Jessie Campbell, Sedrick Cobb, Steven Hayes, Joshua Komisarjevsky, Russell Peeler, Richard Reynolds, Todd Rizzo, Eduardo Santiago, Jr., and Daniel Webb. *Id.*

65. *State v. Santiago*, 122 A.3d 1 (Conn. 2015). The Connecticut Supreme Court reaffirmed this decision in *State v. Peeler*, 140 A.3d 811 (Conn. 2016).

66. *State v. Santiago*, 122 A.3d 1, 9 (Conn. 2015) (“[W]e are persuaded that following its prospective abolition, this state’s death penalty no longer comports with contemporary standards of decency and no longer serves any legitimate penological purpose. For these reasons execution of those offenders who committed capital felonies prior to April 25, 2012, would violate the state constitutional prohibition against cruel and unusual punishment.”). In a concurring opinion, and relying on the Eighth Amendment as well as the Connecticut Constitution, Justice Eveleigh cited and discussed several federal and other state court rulings and historical practices supporting the conclusion that offenders under sentence of death at the time death penalty laws were repealed or significantly restricted could not thereafter be lawfully executed. *Id.* at 177–95. *But see* Barry I, *supra* note 11, at 344–52 (citing and discussing decisions in which courts have declined to give retroactive effect to changes in death-penalty laws). See also *id.* at 352–57, 374–78 (citing and discussing court decisions that have given retroactive application to changes in death-penalty laws).

67. Michael Ross waived further judicial review of his capital conviction and sentence, and on May 13, 2005 was the last person to be executed in Connecticut. See *State v. Ross*, 849 A.2d 648 (Conn. 2004); Caycie D. Bradford, *Waiting to Die, Dying to Live: An Account of the Death Row Phenomenon from a Legal Viewpoint*, 5 INTERDISC J. HUM. RTS L. 77, 83 (2011); Executions Database (filter Connecticut), DEATH PENALTY INFOR. CTR., <https://deathpenaltyinfo.org/executions/execution-database?filters%5Bstate%5D=Connecticut> [<https://perma.cc/WF7M-5STQ>].

68. DPIC, *supra* note 67.

5. Delaware

Legislative repeal April 2, 1958

No executions post-repeal to reinstatement

Reinstatement December 18, 1961

Judicial invalidation August 2, 2016

No executions following invalidation

Delaware repealed its death-penalty law on April 2, 1958.⁶⁹ Capital punishment legislation was reenacted three years later, on December 18, 1961.⁷⁰ The last execution in the state prior to the 1958 repeal took place in 1946.⁷¹ The next did not occur until well after reinstatement, in the modern death penalty era, in 1992.⁷² Delaware carried out its last execution on April 4, 2012.⁷³ Four years later, on August 2, 2016, the Delaware Supreme Court invalidated the state's death-penalty law in *Rauf v. State*,⁷⁴ ruling that the sentencing provisions violated the Sixth Amendment right to trial by jury.⁷⁵ This decision was given retroactive effect,⁷⁶ thus invalidating the death sentences of the 17 individuals then on the state's death row.⁷⁷ No executions were carried out following the

69. See *Death Row*, DEL. DEP'T. CORRECTIONS, <https://doc.delaware.gov/views/deathrow.blade.shtml> [<https://perma.cc/QDW3-4DV3>]; 51 Del. Laws 742 (1958).

70. *Death Row*, *supra* note 69 (In 1961, "[t]he Delaware Legislature passed a bill reinstating the death penalty, but Governor Elbert N. Carvel vetoed the bill on December 12. However, both the Senate and House overrode the veto, so on December 18 the death penalty was reinstated."); 53 Del. Laws 801 (1961).

71. Forrest Sturdivant was executed May 10, 1946. DPIC, *Executions in the U.S.*, *supra* note 36.

72. Steven Brian Pennell was executed March 14, 1992. *Id.* See *Death Row Executions*, DEL. DEP'T. CORR., <https://doc.delaware.gov/views/executions.blade.shtml> [<https://perma.cc/7NP3-A2B7>].

73. *Death Row Executions supra* note 72 (execution of Shannon Johnson, April 20, 2012); *Execution Database (Delaware)*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/execution-database?filters%5Bstate%5D=Delaware> [<https://perma.cc/MD2E-7YY4>].

74. *Rauf v. State*, 145 A.3d 430 (Del. 2016) (per curiam).

75. In making its decision, the Delaware Supreme Court relied on the United States Supreme Court's decision in *Hurst v. Florida*, 136 S.Ct. 616 (2016). See *Rauf v. State*, 145 A.3d 430, 433 (Del. 2016) (per curiam) ("[T]he majority's collective view [is] that Delaware's current death penalty statute violates the Sixth Amendment role of the jury as set forth in *Hurst*."). See generally Sheri Lynn Johnson, John H. Blume, Theodore Eisenberg, Valerie P. Hans & Martin T. Wells, *The Delaware Death Penalty: An Empirical Study*, 97 IOWA L. REV. 1925, 1929-31 (2012) (describing the evolution of Delaware's capital-sentencing provisions, including the legislative decision in 1991 to replace jury sentencing with judge sentencing).

76. *Powell v. State*, 153 A.3d 69 (Del. 2016) (per curiam).

77. *Id.* See *Death Row U.S.A.*, NAACP LEGAL DEF. & EDUC. FUND, INC., <https://www.naacpldf.org/wp-content/uploads/DRUSAFall2016.pdf> [<https://perma.cc/225L-BRJS>] (as of Oct. 1, 2016, 17 individuals were under sentence of death in Delaware); Esteban Parra, *Delaware's Last Two Death Row Inmates Sentenced to Life In Prison*, DEL. ONLINE (Mar. 13, 2018),

Delaware Supreme Court's decision in *Rauf v. State*,⁷⁸ and the legislature has not acted to replace the invalidated statute.

6. District of Columbia

Legislative repeal Feb. 26, 1981

No executions after repeal

No executions have occurred in the District of Columbia since 1957.⁷⁹ The death-penalty law then in effect was rendered unconstitutional by the Supreme Court's decision in *Furman v. Georgia*.⁸⁰ On December 17, 1980, the Council of the District of Columbia voted unanimously to repeal the invalidated death penalty statute, which lingered on the books. The Death Penalty Repeal Act of 1980 took effect February 26, 1981.⁸¹ No death sentences have since been imposed or carried out in Washington D.C.

7. Hawaii

Legislative repeal June 5, 1957

No executions subsequent to repeal

Hawaii became a state in 1959.⁸² It has never authorized the death penalty during statehood.⁸³ The last execution under civilian authority in territorial Hawaii was carried out in 1944.⁸⁴ The Hawaiian Territorial

<https://www.delawareonline.com/story/news/local/2018/03/13/delawares-last-death-row-inmates-resentenced-life-prison-tuesday/407863002/> [<https://perma.cc/A6RG-ZEVB>].

78. *Execution Database (Delaware)*, *supra* note 73.

79. DPIC, *Executions in the U.S.*, *supra* note 36 (showing execution of Robert Carter, April 26, 1957); ICPSR: *The Espy File*, *supra* note 29, at Washington, D.C. V16(11), V14 (indicating no executions after 1957); *Execution Database (District of Columbia)*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/execution-database?filters%5Bstate%5D=District%20of%20Columbia> [<https://perma.cc/JUH6-7RZZ>] (indicating no executions 1977 to date).

80. *See United States v. Lee*, 489 F.2d 1232, 1246–47 (D.C. Cir. 1973) (invalidating sentence of death imposed under 22 D.C. Code § 2404 in light of Supreme Court's ruling in *Furman v. Georgia*, 408 U.S. 238 (1972)).

81. D.C. Law § 3-113 (1981).

82. *Hawaii Statehood, August 21, 1959*, NAT'L ARCHIVES, THE CTR. FOR LEGIS. ARCHIVES, <https://www.archives.gov/legislative/features/hawaii> [<https://perma.cc/EG2V-DSEU>].

83. *See HAW. REV. STAT. § 706-656(1)* (2014) (life imprisonment without possibility of parole is punishment for first-degree murder committed by persons 18 years of age or older).

84. ICPSR: *The Espy File*, *supra* note 29, at Hawaii V16 (15), V14; (no executions after 1944); Jonathan Y. Okamura, *Application and Abolition: Race and Capital Punishment in Territorial Hawaii'i*, <https://scholarspace.manoa.hawaii.edu/bitstream/10125/64730/jokamura.pdf> [<https://perma.cc/7NEC-4JJB>] (identifying the 1944 execution of Adriano Domingo as the last one

legislature passed a bill abolishing the death penalty on June 4, 1957, and Governor Samuel Wilder King signed the repeal legislation the next day.⁸⁵ Two men, Joseph Josiah and Sylvestre Adoca, were under sentence of death at the time the repeal legislation went into effect.⁸⁶ Governor William F. Quinn commuted Josiah's sentence to life imprisonment in 1958, after Josiah's appeal to set aside his 1954 conviction and death sentence was rejected.⁸⁷ The Governor also commuted Adoca's death sentence, thus ensuring that no one would be executed under Hawaii law after the repeal legislation took effect.⁸⁸

8. Illinois

Legislative repeal July 1, 2011
No post-repeal executions

The last execution in Illinois occurred when Andrew Kokoraleis died by lethal injection on March 17, 1999.⁸⁹ Governor George Ryan issued four pardons and commuted the death sentences of the remaining individuals on Illinois' death row when he left office in January 2003.⁹⁰ A moratorium on executions remained in effect over the next several years, although offenders continued to be sentenced to death. On March 9, 2011, Illinois Governor Patrick Quinn signed legislation repealing the

carried out in Hawaii); Joseph Theroux, *A Short History of Hawaiian Executions, 1826–1947*, 25 THE HAWAIIAN J. OF HIST. 147, 147 (1991). Later executions in Hawaii in 1945 and 1947 were carried out under military authority. *Id.* at Appendix II (noting military executions of Cornelius Thomas, on August 1, 1945, and of Garlon Mickles, on April 22, 1947).

85. H.B. 706 (Haw 1957), cited in Theroux, *supra* note 84, at 153–54. “The bill became Act 282 . . .” *Id.* at 154. See also Okamura, *supra* note 84, at 66.

86. Theroux, *supra* note 84, at 154.

87. Okamura, *supra* note 84, at 67 (citing *Quinn Will Commute Death Term*, HONOLULU ADVERTISER, March 26, 1958, at A1, A4).

88. *Quinn Will Commute Death Term*, *supra* note 87, at A1. See also ICPSR: *The Espy File*, *supra* note 29, at Hawaii V16(15), V14 (last execution in Hawaii through 2002 occurred in 1944); *Execution Database (Hawaii)*, DEATH PENALTY INFO. CTR. (no executions in Hawaii in 1977 or later), <https://deathpenaltyinfo.org/executions/execution-database?filters%5Bstate%5D=Hawaii> [https://perma.cc/PX9N-N6HK].

89. *Execution Database (Illinois)*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/execution-database?filters%5Bstate%5D=Illinois> [https://perma.cc/5MWC-YCXX].

90. See Austin Sarat, *Putting A Square Peg in A Round Hole: Victims, Retribution, and George Ryan's Clemency*, 82 N.C. L. REV. 1345–46, n.2 (2004); Rob Warden, *How and Why Illinois Abolished the Death Penalty*, 30 L. & INEQ. 245, 269–70 (2012); Leigh B. Bienen, *Capital Punishment in Illinois in the Aftermath of the Ryan Commutations: Reforms, Economic Realities, and a New Saliency for Issues of Cost*, 100 J. OF CRIM. L. & CRIMINOLOGY 1301, 1306–07 (2010).

state's death penalty.⁹¹ The repeal bill became effective July 1, 2011. It specified: "Beginning on the effective date of this amendatory Act . . . , notwithstanding any other law to the contrary, the death penalty is abolished and a sentence to death may not be imposed."⁹² Fifteen men were under sentence of death in Illinois when the repeal bill was passed. Governor Quinn commuted all their death sentences when he signed the repeal legislation.⁹³

The death penalty has not been reinstated in Illinois and no executions were carried out following the repeal of the state's capital punishment law.⁹⁴

91. *Illinois Governor Signs Bill Ending Death Penalty, Marking the Fewest States with Capital Punishment Since 1978*, DEATH PENALTY INFO. CTR. (Mar. 9, 2011), <https://deathpenaltyinfo.org/news/illinois-governor-signs-bill-ending-death-penalty-marking-the-fewest-states-with-capital-punishment-since-1978> [<https://perma.cc/2C8U-HYYQ>].

92. 725 ILL. COMP. STAT. 5/119-1(a) (2011); Warden, *supra* note 90.

93. *List of Clemencies Since 1976*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/facts-and-research/clemency/list-of-clemencies-since-1976> [<https://perma.cc/9UNW-QWGT>]. See also *Death Row U.S.A.*, NAACP LEGAL DEF. AND EDUC. FUND, INC., at 49–50 (Winter 2011), https://www.naacpldf.org/wp-content/uploads/DRUSA_Winter_2011.pdf [<https://perma.cc/C4QR-8BS7>] (identifying sixteen individuals on Illinois' death row as of January 1, 2011); *Death Row U.S.A.*, NAACP LEGAL DEF. AND EDUC. FUND, INC., at 1 (Spring 2011), https://www.naacpldf.org/wp-content/uploads/DRUSA_Spring_2011.pdf [<https://perma.cc/D98A-9PUK>] ("In March 2011, a bill abolishing the death penalty passed in Illinois, effective July 1, 2011. Gov. Quinn commuted the death sentences of all Illinois prisoners."). While signing the bill repealing the state's death-penalty law, Governor Quinn said, in part:

Since our experience has shown that there is no way to design a perfect death penalty system, free from the numerous flaws that can lead to wrongful convictions or discriminatory treatment, I have concluded that the proper course of action is to abolish it. With our broken system, we cannot ensure justice is achieved in every case. For the same reason, I have also decided to commute the sentences of those currently on death row to natural life imprisonment, without the possibility of parole or release. I have found no credible evidence that the death penalty has a deterrent effect on the crime of murder and that the enormous sums expended by the state in maintaining a death penalty system would be better spent on preventing crime and assisting victims' families in overcoming their pain and grief. To those who say that we must maintain a death penalty for the sake of the victims' families, I say that it is impossible not to feel the pain of loss that all these families share or to understand the desire for retribution that many may hold. But, as I heard from family members who lost loved ones to murder, maintaining a flawed death penalty system will not bring back their loved ones, will not help them to heal and will not bring closure to their pain. Nothing can do that. We must instead devote our resources toward the prevention of crime and the needs of victims' families, rather than spending more money to preserve a flawed system.

Statement from Governor Pat Quinn on Senate Bill 3539, DEATH PENALTY INFO. CTR., <https://files.deathpenaltyinfo.org/legacy/documents/ILGovernorStatement.pdf> [<https://perma.cc/UXN5-NEP2>]. See also Warden, *supra* note 90, at 245, n.2.

94. See DEATH PENALTY INFO. CTR., *supra* note 89.

9. Iowa

Legislative repeal May 1, 1872
 No executions during repeal period through reinstatement
 Legislative reinstatement May 26, 1878
 First post-repeal execution Dec. 16, 1887
 Legislative repeal July 4, 1965
 No executions following repeal

Iowa retained the death penalty when it became a state in 1846.⁹⁵ The last execution occurred in 1865, before its 1872 repeal legislation took effect.⁹⁶ The legislature first repealed the state's capital punishment law May 1, 1872.⁹⁷ Considerable drama preceded the repeal because the Iowa Supreme Court had affirmed the murder conviction and death sentence of William Stanley in late February 1872 and Governor Cyrus Carpenter set April 12, 1872 as Stanley's execution date. On April 8, with the execution imminent, the Iowa House passed a resolution asking the governor to delay Stanley's execution to enable the Legislature to consider abolition legislation. The state Senate adopted the resolution the following day and the governor granted Stanley a one-month reprieve. An abolition bill passed the House on April 19 and the Senate on April 20. Stanley was thus spared execution, in keeping with the legislative intent to eliminate the capital sanction.⁹⁸

Iowa reinstated capital punishment on May 26, 1878, just six years after enacting the 1872 repeal statute.⁹⁹ No one was executed in Iowa between the 1872 repeal and the 1878 reinstatement. The next execution

95. GALLIHER ET AL., *supra* note 36, at 170.

96. ICPSR: *The Espy File*, *supra* note 29, at Iowa V16(19), V14; DPIC, *Executions in the U.S. 1608-2002: The ESPY File*, DEATH PENALTY INFO. CTR., at 117, <https://files.deathpenaltyinfo.org/legacy/documents/ESPYyear.pdf> [<https://perma.cc/6SEN-U49B>] (execution of Benjamin McComb, February 17, 1865).

97. 1872 Iowa Acts 139; GALLIHER ET AL., *supra* note 36, at 170.

98. Richard Acton, *The Magic of Undiscovered Effort: The Death Penalty in Early Iowa, 1838-1878*, 30 ANNALS OF IOWA 721, 730-37 (Winter 1991), <https://ir.uiowa.edu/cgi/viewcontent.cgi?article=9507&context=annals-of-iowa> [<https://perma.cc/YY2K-S3WD>]. "The 1872 legislature . . . had to consider more than a theoretical argument: it had to decide whether George Stanley should hang. As a leading member of the House wrote four days before the scheduled execution, 'This brings home to every legislator the responsibility of saying whether a fellow being shall be killed by the State.' Faced with the actual decision of whether a man should live or die, the legislature voted overwhelmingly that he should live." *Id.* at 749-50.

99. 1878 Iowa Acts 150-51; GALLIHER ET AL., *supra* note 36, at 171; Acton, *supra* note 98, at 749.

was carried out in 1887.¹⁰⁰ The last execution conducted under state authority in Iowa took place in 1962.¹⁰¹ Three years later, on February 24, 1965, the Iowa Legislature voted once again to repeal the state's death-penalty law.¹⁰² The legislation became effective later that year, on July 4.¹⁰³ One month before the Legislature voted to abolish the death penalty, Governor Harold Hughes commuted the death sentence of Leon Tice, the lone offender then awaiting execution in Iowa.¹⁰⁴ No one has been executed in Iowa following the 1965 repeal.¹⁰⁵

10. Kansas

Legislative repeal Jan. 30, 1907

No executions during repeal period through reinstatement

Legislative reinstatement March 11, 1935

First post-reinstatement execution March 10, 1944

Kansas repealed its death-penalty legislation on January 30, 1907.¹⁰⁶ The last execution carried out under state authority took place 37 years earlier, when William Dickson was hanged on August 8, 1870.¹⁰⁷

100. ICPSR: *The Espy File*, *supra* note 29; DEATH PENALTY INFO. CTR., *supra* note 96, at 116 (execution of Chester Bellows, December 16, 1887).

101. Charles Kelly was executed on September 9, 1962. DEATH PENALTY INFO. CTR., *supra* note 96, at 117. The ICPSR database depicts a 1963 execution occurring in Iowa. ICPSR: *The Espy File*, *supra* note 29. However, that execution, of Victor Feguer on March 15, 1963, was carried out under federal authority rather than state law. See DEATH PENALTY INFO. CTR., *supra* note 29, at 117; *Federal Government Set to Resume Executions*, N.Y. TIMES, Mar. 14, 1995, <https://www.nytimes.com/1995/03/14/us/federal-government-set-to-resume-executions.html> [<https://perma.cc/T98M-GYBL>] (“The last civilian executed by the Federal Government was Victor Feguer, who was hanged in Iowa in 1963 for murder and kidnapping.”).

102. See Laws of the Sixty-First General Assembly (Iowa), Ch. 435, H.F. 8 “Death Penalty Abolished,” approved Feb. 24, 1965.

103. 1965 Iowa Acts 827–28; GALLIHER ET AL., *supra* note 36, at 176–77.

104. George Mills, *Death Order is Commuted to Life Term*, DES MOINES REGISTER, Jan. 10, 1965, at 1, <https://www.newspapers.com/clip/36579656/leon-tice-family-history-p-1/> [<https://perma.cc/ANM5-CQ7Q>]. See also DICK HAWS, IOWA AND THE DEATH PENALTY: A TROUBLED RELATIONSHIP 1834-1965, 298 (2010).

105. ICPSR: *The Espy File*, *supra* note 29; DEATH PENALTY INFO. CTR., *supra* note 96.

106. Louise Barry, *Legal Hangings in Kansas*, 18 KAN. HIST. Q. 279, 281 n.12 (1959), https://www.kshs.org/publicat/khq/1950/1950august_barry.pdf [<https://perma.cc/P8DV-XWYH>]. The repeal legislation, stated in part: “Persons convicted of murder in the first degree shall be punished by confinement and hard labor in the Penitentiary of the state of Kansas for life” *Id.* at 279 (quoting 1907 Kan. Sess. Laws, 188). See also 1907 Kan. Sess. Laws 299; Galliher, et al., *supra* note 41, at 545 & n.47 (citing 1907 Kan. Sess. Laws 188).

107. Barry, *supra* note 106, at 282. Three later executions occurred in Kansas during the 1880s (Lee Mosier in 1887, and Jake Tobler and Joe Tobler in 1888), but all were carried out under federal authority. *Id.* See also ICPSR: *The Espy File*, *supra* note 29, at Kansas V16(20), V14; DEATH PENALTY INFO. CTR., *supra* note 93, at 133.

Sentiment about capital punishment was divided in the state, and in 1872 legislation was enacted that required a delay of at least one year between the imposition of a death sentence and its execution. The legislation further required the governor to issue an execution warrant before a death sentence could be carried out. Although murderers continued to be sentenced to death in the 1870s and into the early 20th century, Kansas governors declined to sign warrants authorizing executions.¹⁰⁸ Numerous individuals consequently were on Kansas's death row when the 1907 repeal legislation became effective.¹⁰⁹ In 1908, in response to petitions filed by two persons who had been sentenced to death prior to the repeal legislation's enactment, the Kansas Supreme Court ruled that capital sentences that had been imposed prior to the death-penalty law's repeal remained valid.¹¹⁰ Although several inmates thus remained under sentence of death after the repeal of the state's death penalty law, none

108. Barry, *supra* note 106, at 280; Michael Church, *Capital Punishment, 1870-1907*, KAN. ST. HIST. SOC'Y: KAN. MEMORY BLOG (Jan. 24, 2008), <https://www.kansasmemory.org/blog/post/28195390> [<https://perma.cc/4GV4-ASU7>]; Galliher, et al., *supra* note 41, at 545–46.

109. Barry, *supra* note 106, at 297 (“By the last of June 1906, the [Kansas] penitentiary's death-sentence population had increased to 60 men. This was the maximum number; two years later there were 57 and by 1915 only 14.”) (footnotes omitted).

110. *In re Schneck*, 96 P. 43 (Kan. 1908). Neither *In re Schneck* nor the companion case of *Ex parte Stewart*, 96 P. 45 (Kan. 1908) (per curiam) involved a constitutional challenge. The defendant in *Schneck* was charged with a murder allegedly committed in February 1907, prior to the effective date of the repeal legislation. He argued that he was eligible for release on bail because the death penalty had been abolished. The court held that murder committed prior to the repeal legislation becoming effective remained a capital crime, and hence was not bailable:

It is urged on behalf of the petitioner that, as the criminal action against him was not commenced until after the repeal of the statute imposing the death penalty, the penalty of death cannot be imposed upon him, if he be convicted, and therefore the crime charged is not a capital offense, and is bailable. Had the Legislature in the enactment of the amendment which changes the penalty provided to what cases the amendment should be applicable with reference to the time of its passage, the special provision would control. In the absence, however, of any such provision, the general provision in section 7342 applies. The disputed question, then, hinges upon the meaning of the words “penalty incurred” as used in the general provision. . . .

The penalty is imposed by the court after the fact of guilt is legally determined. It is incurred when the act for which the law prescribed the penalty is committed. It follows, then, since the crime is charged to have been committed before the repeal of the statute prescribing the penalty of death, that the repeal and amendment does not affect the penalty of the crime charged, and, assuming that the proof is evident and the presumption great, the petitioner is not entitled to bail.

In re Schneck, 96 P., at 44–45 (1908). See generally “Abolition of death penalty as affecting right to bail of one charged with murder in first degree,” 8 A.L.R. 1352 (Originally published in 1920). The defendants in *Schneck* and *Stewart*, Frank Schneck and Mollie Stewart, were later paroled. The Kansas Archives in Topeka contain their parole papers, copies of which are on file with Brian Stull.

were executed.¹¹¹ Kansas reinstated capital punishment for murder through legislation that became effective March 11, 1935.¹¹² The first execution under this law did not take place until Ernest Hoefgen was hanged on March 10, 1944 for a murder committed in 1943.¹¹³

11. Maine

Legislative repeal Feb. 21, 1876

No executions occurred between 1876 repeal and 1883 reinstatement
Reinstatement March 13, 1883

First post-reinstatement execution April 17, 1885

Legislative repeal March 17, 1887

No post-repeal executions

The Maine Legislature repealed the state's death-penalty law for the first time through a measure approved on February 21, 1876. The repeal was made prospective, applying only to offenses committed after the statute's enactment.¹¹⁴ However, no executions were carried out while the legislative repeal was in effect. Two executions in 1875 were the last ones conducted before the repeal legislation was passed.¹¹⁵ No other executions took place in the state until after the Legislature reinstated the death penalty for murder on March 13, 1883.¹¹⁶ The only post-reinstatement

111. Barry, *supra* note 106, at 279, 282; Galliher, et al., *supra* note 41, at 571.

112. 1935 Kan. Sess. Laws 234; Galliher, et al., *supra* note 41, at 571, n.237 (citing 1935 Kan. Sess. Laws 234).

113. DEATH PENALTY INFO. CTR., *supra* note 96, at 133 (execution of Ernest Hoefgen, March 10, 1944); Barry, *supra* note 21, at 298; DEATH PENALTY ARCHIVE, *Documentation for the Execution of Ernest Hoefgen, 1944-03-10*, <https://archives.albany.edu/concern/daos/1z40m411t#?c=0&m=0&s=0&cv=0&xywh=-65%2C134%2C4902%2C3151> [<https://perma.cc/4JXT-8ZYA>]; *A History of Capital Punishment in Kansas Through 1994*, WICHITA EAGLE (Oct. 5, 2015), <https://www.kansas.com/news/local/crime/article37624236.html> [<https://perma.cc/338H-HYCM>].

114. 1876 Me. Laws 82 was styled: "An Act to abolish the Death Penalty and to regulate the manner of Applying for Pardons in certain cases." In relevant part it provided: "SECT. 1. The penalty of death, as a punishment for crime, is hereby abolished. SECT. 2. All crimes now punishable with death shall hereafter be punished by imprisonment at hard labor for life." The repeal applied prospectively: "SECT. 8. The provisions of this act shall not apply to offences committed before the same goes into effect." 1876 Me. Laws 82, http://lfdc.mainelegislature.org/Open/Laws/1876/1876_PL_c114.pdf [<https://perma.cc/AU54-3TKN>]. See also 1876 Me. Laws 81; GALLIHER, ET AL., *supra* note 36, at 59.

115. ICPSR: *The Espy File*, *supra* note 29 at Maine V16(23), V14; DEATH PENALTY INFO. CTR., *supra* note 93, at 186 (execution of John Gordon, June 25, 1875; execution of Louis Wagner, June 25, 1875). See Edward Schriver, *Reluctant Hangman: The State of Maine and Capital Punishment, 1820-1887*, 63 NEW ENGLAND Q. 271, 281-82 (1990).

116. 1883 Me. Laws 205, http://lfdc.mainelegislature.org/Open/Laws/1883/1883_PL_c205.pdf [<https://perma.cc/2QJA-K6FZ>]. See also 1883 Me. Laws 169; GALLIHER, ET AL., *supra* note 36, at

executions occurred in Maine in 1885,¹¹⁷ two years after the reinstatement legislation took effect. All three men executed in 1885 were convicted of murders that were committed after the 1883 law restored the death penalty.¹¹⁸ These were the last executions conducted in Maine. The Legislature abolished capital punishment for murder on March 17, 1887.¹¹⁹ The death penalty has not been restored in Maine and no later executions have been carried out in the state.¹²⁰

12. Maryland

Legislative repeal October 1, 2013

No executions following repeal

Maryland's death penalty was repealed by legislation which became effective October 1, 2013.¹²¹ Five individuals were under sentence of death when the repeal legislation went into effect.¹²² None were executed.

59. See generally Schriver, *supra* note 115, at 284. A companion provision specified that capital punishment for treason and arson was abolished. 1883 Me. Laws 247, http://ldc.mainelegislature.org/Open/Laws/1883/1883_PL_c247.pdf [https://perma.cc/6KXN-ECDJ].

117. ICPSR: *The Espy File*, *supra* note 29, at Maine V16(23), V14; DEATH PENALTY INFO. CTR., *supra* note 93, at 186 (execution of Raffaele Capone, April 17, 1885; execution of Carmine Santore, April 17, 1885; execution of Daniel Wilkinson, November 20, 1885). See also *Capital Punishment*, ME., AN ENCYCLOPEDIA, <https://maineencyclopedia.com/capital-punishment/> [https://perma.cc/5UTD-LYF3].

118. Daniel Wilkinson murdered a police officer, William Lawrence, on September 3, 1883. Raffaele Capone and Carmine Santore murdered Paschual Coscia in February 1884. Schriver, *supra* note 115, at 284.

119.

1887 Me. Laws 133 (death penalty is abolished), http://ldc.mainelegislature.org/Open/Laws/1887/1887_PL_c133.pdf [https://perma.cc/7A98-44U2]. See also 1887 ME. LAWS 104; Schriver, *supra* note 115, at 285; GALLIHER, ET AL., *supra* note 36, at 59–60.

120. ICPSR: *The Espy File*, *supra* note 29, at Maine V16(23), V14; DEATH PENALTY INFO. CTR., *supra* note 93, at 186; DEATH PENALTY INFO. CTR., *Execution Database, Maine*, <https://deathpenaltyinfo.org/executions/execution-database?filters%5Bstate%5D=Maine> [https://perma.cc/EZB4-4MRY] (no executions carried out in Maine 1977 or later); Schriver, *supra* note 115, at 287.

121. S.B. 276, 433rd Sess. of the Gen. Assemb. (Md. 2013) (repealing death penalty and substituting life imprisonment without the possibility of parole for first degree murder). See MD. CODE ANN. CRIM. LAW § 2-2-1(b)(1) (West, 2019) (providing for punishment of life imprisonment without parole or life imprisonment for first-degree murder). Governor Martin O'Malley signed the death penalty repeal bill May 2, 2013. See *Maryland: Governor Signs Repeal of the Death Penalty*, N.Y. TIMES (May 2, 2013), <https://www.nytimes.com/2013/05/03/us/maryland-governor-signs-repeal-of-the-death-penalty.html> [https://perma.cc/5ABG-6NRS].

122. NAACP LEGAL DEF. AND EDUC. FUND, INC., *Death Row U.S.A.*, at 53 (Fall 2013), https://www.naacpldf.org/wp-content/uploads/DRUSA_Fall_2013.pdf [https://perma.cc/BKP3-NNY5] (identifying the five men then on Maryland's death row: John Booth, Heath William Burch, Vernon Evans, Anthony Grandison, and Jody Lee).

John Booth-El, formerly known as John Booth, died of natural causes in April 2014.¹²³ Governor Martin O'Malley commuted the sentences of the four remaining offenders on death row to life imprisonment without parole upon leaving office in January 2015.¹²⁴ The death penalty has not been reinstated in Maryland and no executions have occurred in the state following enactment of the 2013 repeal legislation.¹²⁵

13. Massachusetts

Judicial invalidation Oct. 18, 1984

No later executions

The last executions in Massachusetts were carried out in 1947,¹²⁶ when two men were electrocuted pursuant to a law later rendered unconstitutional by the Supreme Court's decision in *Furman v. Georgia*.¹²⁷ Legislative attempts to reintroduce the death penalty in the

123. See Jeff Barker & Jonathan Pitts, *Demise of Death Row Inmate Rekindles Debate Over Capital Punishment*, THE BALTIMORE SUN (April 28, 2014), <https://www.baltimoresun.com/news/crime/bs-xpm-2014-04-28-bs-md-death-row-man-dies-20140428-story.html> [<https://perma.cc/3UHL-FREX>]. Booth's original death sentence was vacated when the Supreme Court ruled that victim impact evidence was improperly admitted during the penalty-phase of his trial. Booth subsequently was resentenced to death and thus remained on Maryland's death row when he died in 2014. *Id.*; *Booth v. Maryland*, 482 U.S. 496 (1987) *overruled by* *Payne v. Tennessee*, 501 U.S. 808 (1991); *Booth v. State*, 608 A.2d 162 (Md. 1992).

124. See *List of Clemencies Since 1976*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/facts-and-research/clemency/list-of-clemencies-since-1976> [<https://perma.cc/CB8C-9QBY>] (Governor O'Malley commuted the death sentences of Heath Burch, Vernon Evans, Anthony Grandison, and Jody Lee in 2015); *State and Federal Info, Maryland*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/maryland> [<https://perma.cc/5KQQ-J6HX>]; Michael Dresser & Erin Cox, *O'Malley Plans to Commute Sentences of Maryland's Four Death Row Inmates*, THE BALTIMORE SUN (Dec. 31, 2014, 8:52 PM), <https://www.baltimoresun.com/politics/bs-md-death-row-commutations-20141231-story.html> [<https://perma.cc/L72K-2E4B>].

125. *Execution Database, (Maryland)*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/execution-database?filters%5Bstate%5D=Maryland> [<https://perma.cc/STV5-5YVH>] (no executions have been carried out in Maryland since December 5, 2005, when Wesley Baker died by lethal injection).

126. ICPSR: *The Espy File*, *supra* note 29, at Massachusetts V16(25), V14; DEATH PENALTY INFO. CTR., *supra* note 96, at 176 (execution of Phillip Bellino, May 9, 1947; execution of Edward Gertsens, May 9, 1947).

127. *Furman v. Georgia*, 408 U.S. 438 (1972). When *Furman* was decided, Massachusetts, in common with other states, authorized capital punishment at the jury's unfettered discretion. The Supreme Court ruled in *Furman* that capital-sentencing laws that failed to limit and guide sentencing discretion presented too great of a risk of arbitrariness and hence violated the Eighth Amendment's prohibition against cruel and unusual punishments. Massachusetts's death-penalty law in effect at that time consequently was declared unconstitutional. See *Stewart v. Massachusetts*, 408 U.S. 845, 845 (1972) (per curiam); *Commonwealth v. Harrington*, 323 N.E.2d 895, 901 (Mass. 1975).

state during the post-*Furman* era were invalidated by the Massachusetts Supreme Judicial Court on state constitutional grounds.¹²⁸ The most recent judicial invalidation occurred in *Commonwealth v. Colon-Cruz* (1984), in which the state high court ruled that the statutory scheme authorizing capital punishment unconstitutionally burdened rights to trial by jury and against compelled self-incrimination.¹²⁹ The Massachusetts Legislature has not enacted legislation to cure the constitutional defects in the 1982 statute in the aftermath of this ruling. Massachusetts consequently remains without a valid death-penalty law and no executions have since taken place within the state.¹³⁰

14. Michigan

Legislative repeal March 1, 1847
No post-repeal executions

128. See *Commonwealth v. O'Neal*, 339 N.E.2d 676, 677 (Mass. 1975) (mandatory death penalty for rape-murder constitutes cruel or unusual punishment in violation of Article 26 of the Declaration of Rights of the Massachusetts Constitution); *Dist. Attorney for the Suffolk Dist. v. Watson*, 411 N.E.2d 1274, 1287 (Mass.1980) (holding the penalty of death is impermissibly cruel under Article 26 of the Declaration of Rights of the Massachusetts Constitution). Thereafter, as explained in *Commonwealth v. Colon-Cruz*, 470 N.E.2d 116, 117–18 (Mass. 1984):

On November 2, 1982, the voters approved a constitutional amendment which added a second and third sentence to art. 26: "No provision of the Constitution, however, shall be construed as prohibiting the imposition of the punishment of death. The general court may, for the purpose of protecting the general welfare of the citizens, authorize the imposition of the punishment of death by the courts of law having jurisdiction of crimes subject to the punishment of death." Art. 116 of the Amendments to the Massachusetts Constitution. This amendment had been adopted by joint sessions of the General Court in the years 1980 and 1982.

On December 15, 1982, both houses of the General Court enacted c. 554 of the Acts of 1982, providing for capital punishment in certain cases of murder in the first degree. The act was approved by the Governor on December 22, 1982, and took effect on January 1, 1983, to apply to offenses committed on or after the effective date. St.1982, c. 554, § 8.

129. *Commonwealth v. Colon-Cruz*, 470 N.E.2d 116 (Mass. 1984). The court ruled that provisions of the capital punishment statute enacted in 1982:

violate art. 12 of the Declaration of Rights of the Massachusetts Constitution. They impermissibly burden both the right against self-incrimination and the right to a jury trial guaranteed by that article. We base this conclusion on the fact that according to the terms of [the statute], the death penalty may be imposed, if at all, only after a trial by jury. Those who plead guilty in cases in which death would be a possible sentence after trial thereby avoid the risk of being put to death. The inevitable consequence is that defendants are discouraged from asserting their right not to plead guilty and their right to demand a trial by jury. For this reason, . . . [the statutory provisions] are not in compliance with the Constitution of the Commonwealth of Massachusetts.

Id. at 124 (footnote omitted).

130. See *Execution Database (Massachusetts)*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/execution-database?filters%5Bstate%5D=Massachusetts> [https://perma.cc/Y464-5ATA] (no executions in Massachusetts 1977 or later).

Michigan became the first state to abolish the death penalty for murder, doing so through legislation that took effect March 1, 1847.¹³¹ The last execution occurred in Michigan in 1836,¹³² before Michigan became a state.¹³³ No execution has ever been carried out under state authority.¹³⁴ A provision prohibiting capital punishment was incorporated into the 1963 Michigan Constitution.¹³⁵

15. Minnesota

Legislative repeal April 22, 1911

No post-repeal executions

Capital punishment was abolished in Minnesota by legislation enacted April 22, 1911.¹³⁶ The last execution was carried out in the state when William Williams was hanged on February 13, 1906.¹³⁷ Two men

131. 1846 Mich. Pub. Acts 658 (“Section 1. All murder which shall be perpetrated by means of poison or lying in wait, or any other kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery or burglary, shall be deemed murder of the first degree, and shall be punished by solitary confinement at hard labor in the state prison for life.”). Prior legislation had authorized capital punishment for first-degree murder. Michigan Revised Statutes ch. 3 sec. 1 (1837 adjourned session and 1838 regular session). Capital punishment remained available in Michigan for treason, although that provision was never used. GALLIHER ET AL., *supra* note 36, at 11.

132. ICPSR: *The Espy File*, *supra* note 29 at Michigan V16(26), V14; DEATH PENALTY INFO. CTR., *supra* note 96, at 186 (execution of Wau-Bau-Ne-Me-Kee July 1836). An execution was carried out under federal authority in Michigan in 1938. *Id.* (execution of Anthony Chebatoris, July 8, 1938); see Michael Mannheimer, *The Unusual Case of Anthony Chebatoris: The ‘New Deal for Crime’ and the Federal Death Penalty in Non-Death States*, 70 SYRACUSE L. REV. (forthcoming 2020), https://papers.ssm.com/sol3/papers.cfm?abstract_id=3436500 [<https://perma.cc/V96D-PJKN>].

133. Michigan became a state January 26, 1837. See *Michigan*, HISTORY (Apr. 29, 2020), <https://www.history.com/topics/us-states/michigan> [<https://perma.cc/6DUM-EN3T>].

134. ICPSR: *The Espy File*, *supra* note 29, at Michigan V16(26), V14; DEATH PENALTY INFO. CTR., *supra* note , at 186 (noting executions in Michigan in 1836 and 1938 and none thereafter). The 1938 execution occurred under federal authority. See ICPSR: *The Espy File*, *supra* note 29 at Michigan; *Execution Database (Michigan)*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/execution-database?filters%5Bstate%5D=Michigan> [<https://perma.cc/YC9A-Z7LN>] (no executions 1977 or later).

135. MICH. CONST. art. IV, § 46 (“No law shall be enacted providing for the penalty of death.”).

136. See Galliher, et al., *supra* note 41, at 554 (citing 1911 Minn. Laws 572); *Capital Punishment in Minnesota*, MINN. ST. L. LIBR., <https://mn.gov/law-library/legal-topics/capital-punishment-in-minnesota.jsp> [<https://perma.cc/S6J6-ZKFE>] (“The death penalty was abolished by the legislature in 1911,” citing 1911 Minn. Laws 387). See generally JOHN BESSLER, *LEGACY OF VIOLENCE: LYNCH MOBS AND EXECUTIONS IN MINNESOTA* (2006).

137. ICPSR: *The Espy File*, *supra* note 29, at Minnesota V16(27), V14; DEATH PENALTY INFO. CTR., *supra* note 93, at 189; MINN. ST. L. LIBR., *supra* note 136; Galliher, et al., *supra* note 41, at 553 (describing hanging, which was prolonged for nearly 15 minutes because of a miscalculation concerning the drop and the length of the rope); GALLIHER ET. AL., *supra* note 36, at 81. No later

were under sentence of death when the repeal bill was being considered in April 1911, Michelangelo Rossi and Martin O'Malley. The State Board of Pardons commuted both men's death sentences to life imprisonment immediately before Governor Adolph Eberhart signed the repeal legislation.¹³⁸

16. Missouri

Legislative repeal Apr. 13, 1917

No post-repeal executions prior to reinstatement

Legislative reinstatement July 8, 1919

First post-reinstatement execution Aug. 12, 1921

Capital punishment was briefly prohibited in Missouri, between April 13, 1917,¹³⁹ when repeal legislation took effect, and July 8, 1919,¹⁴⁰ when the death penalty was reinstated.¹⁴¹ The last executions prior to the 1917 repeal took place August 8, 1916 when Andrew Black and Harry Black were hanged.¹⁴² The first post-reinstatement executions occurred in

executions were conducted in Minnesota. *Id.*; DEATH PENALTY INFO. CTR., *Execution Database (Minnesota)*, <https://deathpenaltyinfo.org/executions/execution-database?filters%5Bstate%5D=Minnesota> [https://perma.cc/964Z-YSX9] (no executions 1977 or later).

138. John D. Bessler, *The 'Midnight Assassination Law' and Minnesota's Anti-Death Penalty Movement, 1849-1911*, 22 WILLIAM MITCHELL L. REV. 577, 691-98 (1992) (discussing the cases of Martin O'Malley and Michelangelo Rossi).

139. Act of April 13, 1917 (Laws 1917, at 246), *quoted in* State v. Lewis, 201 S.W. 80, 85 (1918):

Section 1. *Capital Punishment Not to be Imposed.*—From and after the taking effect of this act it shall be unlawful in this state to take human life as a punishment for crime, and no court shall impose capital punishment as a penalty for crime.

Sec. 2. *Repealing Conflicting Laws.*—All acts and parts of acts inconsistent or in conflict with this act are hereby repealed.

See also 1917 Mo. Laws 246; Galliher, et al., *supra* note 41, at 555. The repeal legislation apparently was not codified before capital punishment was reinstated by legislation enacted in 1919. *See* Ellen Elizabeth Guillot, *Abolition and Restoration of the Death Penalty in Missouri*, in CAPITAL PUNISHMENT 124-26 (Thorsten Sellin, ed., N.Y.: Harper & Row 1967) (reprinting 284 *Annals of the American Academy of Political and Social Science* 105-09 (1952)).

140. 1919 Mo. Laws 778; Galliher, et al., *supra* note 41, at 565, n.190 (*citing* 1919 Mo. Laws 778).

141. Calls for reinstatement of the death penalty intensified as a result of highly publicized killings, including of law enforcement officers. The measure reinstating capital punishment was passed during a special legislative session that Governor Fredrick Gardner called in July 1919 to allow the state legislature to consider ratification of the Nineteenth Amendment to the United States Constitution. Guillot, *supra* note 139, at 129-31.

142. ICPSR: *The Espy File*, *supra* note 29, at Missouri V16(29), V14; DEATH PENALTY INFO. CTR., *supra* note 96, at 194.

1921,¹⁴³ each as punishment for a murder the condemned men jointly committed in November 1920,¹⁴⁴ *i.e.*, after the 1919 replacement legislation became effective. In 1918 the Missouri Supreme Court considered and rejected the argument made by Ora Lewis, who had been convicted of a murder committed in 1916 and sentenced to death on January 10, 1917, that his death sentence could not be carried out because the state's death penalty had been abolished by the 1917 repeal legislation.¹⁴⁵ The Court relied on state law limiting post-offense ameliorative changes in sentencing laws to persons who had not yet been sentenced.¹⁴⁶

Lewis, however, would not be executed. The governor commuted his death sentence, stating that to allow the execution to be carried out following enactment of the repeal legislation “would be against ‘the will of the people as expressed in the new law.’”¹⁴⁷ It thus appears that no one under sentence of death in Missouri when the 1917 repeal legislation became effective was executed.

17. New Hampshire

Legislative repeal May 30, 2019

No post-repeal executions; one offender remains under death sentence

New Hampshire abolished capital punishment through legislation that took effect May 30, 2019.¹⁴⁸ The repeal applied prospectively, “to persons convicted of capital murder on or after the effective date of this

143. ICPSR: *The Espy File*, *supra* note 29, at Missouri V16(29), V14; DEATH PENALTY INFO. CTR., *supra* note 96, at 194–95 (execution of Charles Jacoy, Aug. 12, 1921; execution of John Carroll, Sept. 12, 1921). *But see* HARRIET C. FRAZIER, DEATH SENTENCES IN MISSOURI, 1803-2005: A HISTORY AND COMPREHENSIVE REGISTRY OF LEGAL EXECUTIONS, PARDONS, AND COMMUTATIONS 208 (2006) (indicating that an execution was carried out in 1920).

144. State v. Carroll, 232 S.W. 699 (Mo. 1921); DEATH PENALTY ARCHIVE, *Documentation for the Execution of John Carroll, Charles Jacoy, 1921-09-12*, <https://archives.albany.edu/concern/daos/f849231f?locale=en#?c=0&m=0&s=0&cv=0&xywh=134%2C110%2C5508%2C3541> [<https://perma.cc/6ULJ-4Z9S>].

145. State v. Lewis, 201 S.W. 80 (Mo. 1918).

146. *Id.* at 85–86.

147. FRAZIER, *supra* note 143, at 170.

148. N.H. REV. STAT. ANN. § 630:1, III (2019). In enacting the statute, the state legislature overrode Governor Chris Sununu's veto. *See* Kate Taylor & Richard J. Oppel, Jr., *New Hampshire, With a Death Row of 1, Ends Capital Punishment*, N.Y. TIMES (May 30, 2019), <https://www.nytimes.com/2019/04/11/us/death-penalty-new-hampshire.html> [<https://perma.cc/C6QC-8K5W>]; *N.H. 21st State to Abolish Death Penalty!*, N.H. COAL. TO ABOLISH THE DEATH PENALTY (May 31, 2019), <http://nodeathpenaltynh.org/nh-is-21st-state-to-abolish-the-death-penalty/> [<https://perma.cc/G2V9-HGBX>].

act.”¹⁴⁹ A single offender, Michael Addison, was under sentence of death when the repeal legislation took effect.¹⁵⁰ Addison’s conviction¹⁵¹ and death sentence¹⁵² were upheld on appeal by the New Hampshire Supreme Court. Further litigation remains before judicial review in his case is exhausted.¹⁵³ New Hampshire last carried out an execution in 1939.¹⁵⁴

18. New Jersey

Legislative repeal Dec. 17, 2007

No executions following repeal

New Jersey abolished capital punishment through legislation enacted December 17, 2007.¹⁵⁵ The legislation provided that offenders then under

149. H.R. 455 166th Session of the General Court (N.H. 2019). The entire bill, H.B. 455, provided:

Be it Enacted by the Senate and House of Representatives in General Court convened:

42:1 Homicide; Capital Murder. Amend RSA 630:1, III to read as follows:

<< NH ST § 630:1 >>

III. A person convicted of a capital murder [] *shall be sentenced to imprisonment for life without the possibility for parole.*

42:2 Applicability. Section 1 of this act shall apply to persons convicted of capital murder on or after the effective date of this act.

42:3 Effective Date. This act shall take effect upon its passage.

(Approved: Enacted in accordance with Article II, Part 44, of the N.H. Constitution without signature of the Governor, May 30, 2019).

150. NAACP LEGAL DEF. AND EDUC. FUND, INC., *Death Row U.S.A.*, at 55 (Summer 2019), <https://www.naacpldf.org/wp-content/uploads/DRUSASummer2019-1.pdf> [<https://perma.cc/225Y-DSPB>]; NAACP LEGAL DEF. AND EDUC. FUND, INC., *Death Row U.S.A.*, at 55 (Spring 2019), <https://www.naacpldf.org/wp-content/uploads/DRUSASpring2019.pdf> [<https://perma.cc/KE99-BY3K>]. Addison was convicted and sentenced to death for the murder of Manchester, New Hampshire police officer Michael Briggs. See Evan Allen, *As N.H. Considers Repealing the Death Penalty, the One Man on Death Row Looms Large*, BOS. GLOBE (May 17, 2019, 1:42 PM), <https://www.bostonglobe.com/metro/2019/05/17/considers-repealing-death-penalty-lone-man-death-row-looms-large/00KkWffEcsmba4Lmq2cRJ/story.html> [<https://perma.cc/AUQ7-CCNK>].

151. *State v. Addison*, 87 A.3d 1 (N.H. 2013).

152. *State v. Addison*, 116 A.3d 551 (N.H. 2015), *cert. denied* 136 S. Ct. 812 (2016).

153. Personal communication, James Acker, with attorney Jonathan Cohen, Concord, N.H., February 21, 2020. See also Ethan DeWitt, *Capital Beat: After Death Penalty Repeal, What’s Next for Michael Addison*, CONCORD MONITOR (June 1, 2019, 10:44 PM), <https://www.concordmonitor.com/Capital-Beat-After-death-penalty-repeal-what-s-next-for-Michael-Addison-25934408> [<https://perma.cc/4VVU-2655>].

154. ICPSR: *The Espy File*, *supra* note 29, at New Hampshire V16(33), V14; DEATH PENALTY INFO. CTR., *supra* note 93, at 236 (execution of Howard Long, July 14, 1939); DEATH PENALTY INFO. CTR., *Execution Database (New Hampshire)*, <https://deathpenaltyinfo.org/executions/execution-database?filters%5Bstate%5D=New%20Hampshire> [<https://perma.cc/X345-EKBN>] (no executions 1977 or later).

155. An Act to Eliminate the Death Penalty and Allow for Life Imprisonment Without Eligibility for Parole, Pub. L. No. 2007, c. 204 § 1 (codified at N.J. Stat. Ann. § 2C:11-3 (West Supp.

sentence of death would have their sentences converted to life imprisonment without the possibility of parole upon filing a petition for resentencing within 60 days.¹⁵⁶ That provision was rendered moot when Governor Jon Corzine commuted the death sentences of the eight men on New Jersey's death row the day before the repeal legislation took effect.¹⁵⁷ No executions occurred following the repeal. The last execution in New Jersey took place in 1963.¹⁵⁸

2008)). See generally Aaron Scherzer, *The Abolition of the Death Penalty in New Jersey and Its Impact on Our Nation's 'Evolving Standards of Decency'*, 15 MICH. J. OF RACE & L. 223 (2009).

156. N.J. STAT. ANN. § 2C:11-3b (West 2017). ("An inmate sentenced to death prior to the date of the enactment [Dec. 17, 2007] of this act, upon motion to the sentencing court and waiver of any further appeals related to sentencing, shall be resentenced to a term of life imprisonment during which the defendant shall not be eligible for parole. Such sentence shall be served in a maximum security prison. Any such motion to the sentencing court shall be made within 60 days of the enactment of this act. If the motion is not made within 60 days the inmate shall remain under the sentence of death previously imposed by the sentencing court.")

157. *List of Clemencies Since 1976*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/facts-and-research/clemency/list-of-clemencies-since-1976> [<https://perma.cc/CB8C-9QBY>] (Governor Corzine commuted the death sentences of Marko Bey, David Cooper, Ambrose Harris, Nathaniel Harvey, Sean Kenney, John Martini, Jessie Timmenedequas, and Brian Wakefield on Dec. 16, 2007); *Governor Corzine's Remarks on Eliminating Death Penalty in New Jersey*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/stories/governor-corzines-remarks-on-eliminating-death-penalty-in-new-jersey> [<https://perma.cc/X6AU-SASQ>]; Jeremy S. Peters, *Corzine Signs Bill Ending Executions, Then Commutes Sentences of Eight*, N.Y. TIMES (Dec. 18, 2007), <https://www.nytimes.com/2007/12/18/nyregion/18death.html> [<https://perma.cc/J9XA-VQBQ>]. Governor Corzine's remarks in explanation of his decision to commute the offenders' death sentences were, in part, as follows:

Now, make no mistake: by this action, society is not forgiving these heinous crimes or acts that have caused immeasurable pain to the families and brought fear to society. The perpetrators of these actions deserve absolutely no sympathy and the criminals deserve the strictest punishment that can be imposed without imposing death. That punishment is life in prison without parole. . . . Let me repeat: this bill does not forgive or in any way condone the unfathomable acts carried out by the eight men now on New Jersey's death row. They will spend the rest of their lives in jail. . . . This commutation action provides legal certainty that these individuals will never again walk free in our society. These commutations, along with today's bill signing, brings to a close in New Jersey the protracted moral and practical debate on the death penalty. Our collective decision is one for which we can be proud.

Governor Corzine's Remarks on Eliminating Death Penalty in New Jersey, DEATH PENALTY INFO. CTR., (original paragraph indentations omitted) (Dec. 17, 2007), <https://deathpenaltyinfo.org/stories/governor-corzines-remarks-on-eliminating-death-penalty-in-new-jersey> [<https://perma.cc/3ZMG-67CD>].

158. ICPSR: *The Espy File*, *supra* note 29, at New Jersey V16(34), V14; DEATH PENALTY INFO. CTR., *supra* note 93, at 247 (execution of Ralph Hudson, January 22, 1963); DEATH PENALTY INFO. CTR., *Execution Database (New Jersey)*, <https://deathpenaltyinfo.org/executions/execution-database?filters%5Bstate%5D=New%20Jersey> [<https://perma.cc/UH5M-U4FF>] (no executions in New Jersey 1977 or later).

19. New Mexico

Legislative narrowing March 31, 1969

Full reinstatement March 30, 1979

No executions between narrowing and reinstatement

Legislative repeal July 1, 2009

No post-repeal executions

Judicial invalidation of remaining death sentences June 28, 2019

In 1969, New Mexico's Legislature abolished the death penalty for all crimes except for the murder of law enforcement officers and for those who commit "a second capital felony after time for due deliberation following commission of a capital felony."¹⁵⁹ The law expressly revoked all then existing death sentences, transforming the punishment to life imprisonment.¹⁶⁰ New Mexico had last performed an execution nine years earlier, in 1960.¹⁶¹

In 1975, New Mexico enacted a mandatory death-sentencing scheme, which the New Mexico Supreme Court invalidated in light of *Woodson v. North Carolina*.¹⁶² In 1979, New Mexico enacted a new statute, reinstating the death penalty.¹⁶³ New Mexico repealed this law effective July 1, 2009.¹⁶⁴ The repeal applied prospectively, "to crimes committed on or after July 1, 2009."¹⁶⁵ Two offenders were then under sentence of death, Timothy Allen and Robert Fry.¹⁶⁶ They remained the only inhabitants of New Mexico's death row when the New Mexico Supreme Court ruled in June 2019 that their death sentences were invalid because they were disproportionate to the sentences imposed in

159. 1969 N.M. LAWS 415.

160. *Id.*

161. DEATH PENALTY INFO. CTR., *supra* note 96, at 249.

162. *State v. Rondeau*, 553 P.2d 688, 692 (N.M. 1976) (applying *Woodson v. North Carolina*, 428 U.S. 280 (1976) to invalidate N.M. STAT. ANN. § 40A-29-2 (West 1975)).

163. 1979 N.M. LAWS 522.

164. N.M. STAT. ANN. § 31-18-14 (West 2009) (establishing life imprisonment without the possibility of parole as punishment for capital felonies, and repealing N.M. STAT. ANN. § 31-18-14.1 (West 1978) (authorizing death penalty for capital felonies). *See generally* *Death Penalty Repealed in New Mexico*, N.Y. TIMES (Mar. 18, 2009), <https://www.nytimes.com/2009/03/19/us/19execute.html> [<https://perma.cc/2DW7-7MSH>].

165. H.B. No. 285 § 6 (N.M. 2009). *See generally* Ch. 11, H.B. No. 285, New Mexico 2009 Session Laws, "An Act Relating to Capital Felony Sentencing, Abolishing the Death Penalty, Providing for Life Imprisonment Without Possibility of Release or Parole." *See also* *Fry v. Lopez*, 447 P.3d 1086, 1091, n.1 (N.M. 2019).

166. *See* NAACP LEGAL DEF. AND EDUC. FUND, INC., *Death Row U.S.A.*, at 51, 53 (Winter 2007), https://www.naacpldf.org/wp-content/uploads/DRUSA_Winter_2007.pdf [<https://perma.cc/C8NP-P6Q5>].

comparable cases.¹⁶⁷ No executions were carried out in New Mexico following the 2009 repeal of the state's death-penalty law.¹⁶⁸

20. New York

Legislative narrowing June 1, 1965

No subsequent executions

Judicial invalidation June 7, 1973

Legislative enactment March 7, 1995

Judicial invalidation June 24, 2004; Oct. 23, 2007

No subsequent executions

The last executions were carried out in New York in 1963.¹⁶⁹ Two years later, on June 1, 1965, the state's death-penalty law was significantly narrowed, authorizing punishment by death only for the deliberate and premeditated murder of a peace officer or for murder committed by a life

167. *Fry v. Lopez*, 447 P.3d 1086, 1092 (N.M. 2019) (“Guided by our recognition that our Legislature intended for comparative proportionality review to protect against the arbitrary imposition of the death penalty, we conclude that there is no meaningful basis for distinguishing Fry and Allen from the many similar cases in which the death penalty was not imposed. Because Petitioners’ death sentences are statutorily disproportionate to the penalties imposed in similar cases, we remand each case to the district court to impose a sentence of life imprisonment.”).

168. The last execution in New Mexico occurred November 6, 2001, with the lethal injection of Terry Clark. *Execution Database (New Mexico)*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/execution-database?filters%5Bstate%5D=New%20Mexico> [https://perma.cc/8GT7-FR6M]. See also *Fry v. Lopez*, 447 P.3d 1186, 1100 (N.M. 2019) (“Although New Mexico has authorized the use of capital punishment since before statehood, the death penalty has been infrequently imposed. Only one person has been executed since the enactment of the pre-repeal capital sentencing scheme in 1979. That person was Terry Clark, whose execution took place on November 6, 2001. Before Clark, New Mexico had not executed anyone since David Cooper Nelson in 1960. Only fifteen people, including Fry and Allen, have been sentenced to death since the enactment of the pre-repeal capital sentencing scheme in 1979. With the exception of Clark, none of these death sentences resulted in an execution.”) (footnote and citations omitted).

169. Frederick Charles Wood was executed March 21, 1963, for a murder committed in 1960. Eddie Lee Mays was executed August 15, 1963, for a 1961 murder. DANIEL ALLEN HEARN, *LEGAL EXECUTIONS IN NEW YORK STATE, 1639-1963* 280–82 (McFarland & Co., Jefferson, N.C. 1997). See also ICPSR: *The Espy File*, *supra* note 29, at New York V16(36), V14; DEATH PENALTY INFO. CTR., *supra* note 96, at 286 (Frederick Woods, executed March 21, 1963; listing execution of Eddie Lee Mays June 15, 1963). The correct date of Mays’ execution is August 15, 1963, as noted in DANIEL ALLEN HEARN, *LEGAL EXECUTIONS IN NEW YORK STATE, 1639-1963* 280–82 (McFarland & Co., Jefferson, N.C. 1997). See *The Last Electrocutation*, N.Y. TIMES (Mar. 7, 1995), <https://www.nytimes.com/1995/03/07/nyregion/the-last-electrocutation.html> [https://perma.cc/VE5U-RDCG]. No later executions were carried out in New York after 1977. See *Execution Database (New York)*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/execution-database?filters%5Bstate%5D=New%20York> [https://perma.cc/U3KJ-D254].

term prisoner.¹⁷⁰ No one would be executed under this or subsequent legislation. Five individuals whose murders would not qualify as capital crimes under the narrowing legislation were under sentence of death when the provisions took effect in 1965. Governor Nelson Rockefeller announced his decision to commute their death sentences, explaining: “In view of my action today of approving the bill with respect to capital punishment, it is also my intention that, without inquiring into the individual merits of each case, persons now convicted and sentenced to capital punishment, who are not subject to capital punishment under the new law, will be granted executive clemency and their sentences commuted to life imprisonment, when their cases have run their courses in the courts.”¹⁷¹

The capital punishment laws that were in effect in New York during the 1960s were found unconstitutional in the aftermath of the Supreme Court’s decision in *Furman v. Georgia*.¹⁷² The initial attempts by the state legislature to enact capital sentencing provisions that complied with *Furman* and later Supreme Court decisions also were invalidated by the New York Court of Appeals.¹⁷³ Multiple bills passed by the Legislature to implement the death penalty were vetoed by New York governors beginning in the late 1970s into the 1990s.¹⁷⁴ The state remained without viable death-penalty legislation until September 1, 1995, when a bill signed by Governor George Pataki became effective.¹⁷⁵ No offenders sentenced to death under that statute were executed. All had their

170. N.Y. PENAL LAW § 1045 (McKinney 1965). Prior legislation authorized capital punishment for the much broader category of first-degree murder. See James R. Acker, *New York’s Proposed Death Penalty Legislation: Constitutional and Policy Perspectives*, 54 ALBANY L. REV. 515, 520–25 (1990). The statute underwent minor revisions in 1967. *Id.* at 527. An additional category of murder, the killing of an employee of a jail or correctional institution, was made death-penalty eligible in 1971. *Id.* at 528 (citing Act of July 6, 1971, ch. 1205, sec. 1, § 125.30(1)(a)(ii), 1971 N.Y. Laws 3122–23).

171. NEW YORK STATE, PUBLIC PAPERS OF NELSON A. ROCKEFELLER 1965, 829 (1965), quoted in Acker, *supra* note 170, at 526 n.59. The five individuals whose death sentences were commuted were David Coleman, Manfredo Correa, Edward LeBelle, Anthony Portelli, and Jerome Rosenberg. *Id.*, at 526 n.60.

172. *Furman v. Georgia*, 408 U.S. 238 (1972). Pursuant to *Furman*, the New York Court of Appeals invalidated the state’s death penalty provisions in *People v. Fitzpatrick*, 399 N.E.2d 139 (N.Y. 1973), *cert. denied*, 414 U.S. 1033 (1973).

173. See *People v. Davis*, 371 N.E.2d 456 (N.Y. 1977), *cert. denied*, 435 U.S. 998 (1978), *cert. denied*, 438 U.S. 914 (1978) (*People v. James*); *People v. Smith*, 468 N.E.2d 879 (N.Y. 1984), *cert. denied*, 469 U.S. 1277 (1985). See Acker, *supra* note 170, at 532–33.

174. Acker, *supra* note 170, at 535–36; James R. Acker, *When the Cheering Stopped: An Overview and Analysis of New York’s Death Penalty Legislation*, 17 PACE L. REV. 41, 43 (1996).

175. N.Y. CRIM. PROC. LAW § 400.27 (McKinney 1995). See generally Acker, *When the Cheering Stopped: An Overview and Analysis of New York’s Death Penalty Legislation*, *supra* note 174.

sentences invalidated by New York Court of Appeals decisions in 2004¹⁷⁶ and 2007,¹⁷⁷ which concluded that the law's sentencing provisions violated the state constitution. The New York Legislature did not act to correct the constitutional infirmities. New York consequently is without valid capital punishment legislation and no one in the state is under sentence of death or subject to execution.

21. North Dakota

Legislative repeal for all crimes except murder by life prisoner and treason: March 19, 1915

No post-repeal executions

Legislative repeal for remaining crimes: July 1, 1975

No post-repeal executions

The death penalty was abolished in North Dakota through legislation which took effect March 19, 1915, for all crimes except treason and murder committed by a prisoner serving a life term sentence.¹⁷⁸ The Legislature was aware when it enacted the repeal legislation that a convicted murderer, Joe Milo, was under sentence of death and was scheduled to be executed in August.¹⁷⁹ The repeal legislation was drafted to have retroactive application and it was enacted with an "emergency clause" that made it effective immediately.¹⁸⁰ The statute provided: "Every person who has been or may be hereafter convicted of murder in the first degree shall be punished by confinement at hard labor in the State Penitentiary for life."¹⁸¹ Milo was spared execution as a result of the legislation.¹⁸² The vestigial provisions of the state law that authorized capital punishment for treason and murder committed by a life term prisoner were never used and were formally repealed when North Dakota enacted sweeping changes to its criminal code which took effect in

176. *People v. LaValle*, 817 N.E.2d 341, 366 (N.Y. 2004).

177. *People v. Taylor*, 878 N.E.2d 969, 988 (N.Y. 2007).

178. 1915 N.D. Laws 76; Galliher, et al., *supra* note 41, at 556–57 (citing N.D. House Bill 33); Justice Dale V. Sandstrom, *Four Murder Trials Since the Last Execution in 1905*, STATE OF N.D. COURTS, <https://www.ndcourts.gov/about-us/history/four-capital-murder-trials-since-the-last-execution-in-1905> [https://perma.cc/TGZ5-5JRD].

179. Sandstrom, *supra* note 178.

180. Sandstrom, *supra* note 178; Galliher, et al., *supra* note 41, at 556.

181. 1915 N.D. Laws 76.

182. Sandstrom, *supra* note 178.

1975.¹⁸³ The last execution in North Dakota occurred when John Rooney was hanged for murder on October 17, 1905.¹⁸⁴

22. Oregon

Repeal Dec. 3, 1914 through voter initiative and state constitution amendment

No post-repeal executions through reinstatement

Reinstatement May 21, 1920 through special election and approval of state constitution amendment

Repeal Nov. 30, 1964 through voter initiative and state constitution amendment

No post-repeal executions through reinstatement

Reinstatement Dec. 7, 1978 through voter initiative

No post-reinstatement executions through judicial invalidation

Judicial invalidation January 20, 1981

No post-invalidations executions through reinstatement

Reinstatement through 1984 voter initiative

First post-reinstatement execution Sept. 6, 1996

As a result of a voter initiative which passed in November 1914, an amendment to the Oregon Constitution took effect December 3, 1914, which provided: “The death penalty shall not be inflicted upon any person under the laws of Oregon. The maximum punishment which may be inflicted shall be life imprisonment.”¹⁸⁵ The death penalty was reinstated by Oregon voters at a special election which approved an amendment to

183. Sandstrom, *supra* note 178 (indicating that the provisions were enacted in 1973 and became effective July 1, 1975); *Thompson v. Oklahoma*, 487 U.S. 815, 826 n. 25 (1988) (plurality opinion) (citing N.D. Cent. Code, ch. 12-50 (1985)), “The Death Sentence and Execution Thereof,” repealed by 1973 N.D. Laws, ch. 116, § 41, effective July 1, 1975); GALLIHER ET AL., *supra* note 36, at 100; Frank Vyzralek, *Murder and death by hanging: Capital crimes and criminals executed in northern Dakota Territory and North Dakota, 1885-1905*, STATE OF N.D. COURTS, <https://www.ndcourts.gov/about-us/history/murder-and-death-by-hanging> [https://perma.cc/B98V-NBS7].

184. ICPSR: *The Espy File*, *supra* note 29, at North Dakota V16(38), V14; DPIC, *Executions in the U.S.*, *supra* note 36, at 235; *Execution Database (North Dakota)*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/execution-database?filters%5Bstate%5D=North%20Dakota> [https://perma.cc/S42D-VD9A] (ceasing executions after 1977). See generally *Rooney v. North Dakota*, 196 U.S. 319 (1905) (upholding death sentence against *ex post facto* challenge based on change in location of execution from county jail to state penitentiary, with additional passage of time between imposition of sentence and execution).

185. See WILLIAM R. LONG, *A TORTURED HISTORY: THE STORY OF CAPITAL PUNISHMENT IN OREGON* 31–33 (2001). The provision was incorporated into the OR. CONST. as Article I, § 36. *Id.* at 31.

the state constitution that became effective May 21, 1920. The amendment provided: “The penalty for murder in the first degree shall be death, except when the trial jury in its verdict recommended life imprisonment, in which case the penalty shall be life imprisonment.”¹⁸⁶ Oregon retained the death penalty until November 30, 1964, the effective date of another amendment to the state constitution that was approved by the voters. That amendment repealed the 1920 constitutional provision and thus allowed legislation to take effect that removed statutory authorization for the death penalty and fixed the maximum punishment for murder at life imprisonment.¹⁸⁷ Oregon remained without capital punishment legislation until December 7, 1978, when the death penalty was reinstated through a voter initiative.¹⁸⁸ In 1981, in *State v. Quinn*,¹⁸⁹ the Oregon Supreme Court ruled that the capital sentencing provisions violated the right to trial by jury and invalidated the statute. Three years later, in 1984, voters passed ballot measures that approved a state constitution amendment specifying capital punishment as the penalty for aggravated murder,¹⁹⁰ and that amended the capital punishment statute to provide for jury sentencing and thus cure the infirmity identified by the Oregon Supreme Court in *State v. Quinn*.¹⁹¹

Throughout Oregon’s back-and-forth history with the death penalty,¹⁹² no one who was under sentence of death at the time a capital punishment law was repealed or invalidated by judicial decision was

186. *Id.* at 35 (quoting OR. CONST. art. I, § 37. “Article I, section 38, of the state constitution . . . restore[d] the sections implementing the death penalty from Lord’s Oregon Laws whose effect had been nullified by the vote to abolish capital punishment in 1914.”). *Id.* See also Hugo A. Bedau, *Capital Punishment in Oregon, 1903-64*, 45 OR. L. REV. 1, 1 n.2 (1965). See generally Robert H. Dann, *Capital Punishment in Oregon*, 284 ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. 110 (1952).

187. See Bedau, *supra* note 186, at 1 n.4; LONG, *supra* note 185, at 53.

188. LONG, *supra* note 185, at 60 (citing OR. REV. STAT. §§ 163.115 (1), (3) (1978)).

189. *State v. Quinn*, 623 P.2d 630 (1981), overruled on other grounds, *State v. Hall*, 115 P.3d 908 (Or. 2005).

190. OR. CONST. art. I § 40 (“Notwithstanding sections 15 and 16 of this Article, the penalty for aggravated murder as defined by law shall be death upon unanimous affirmative jury findings as provided by law and otherwise shall be life imprisonment with minimum sentence as provided by law.”).

191. Oregon’s 1984 Death-Penalty Statute, OR. REV. STAT. §163.150 (2011). See Aliza B. Kaplan, *Oregon’s Death Penalty: The Practical Reality*, 17 LEWIS & CLARK L. REV. 1, 11–12 (2013). See generally, *Oregon Death Penalty*, OR. DEPT. OF CORR., <https://www.oregon.gov/doc/about/Pages/oregon-death-penalty.aspx> [<https://perma.cc/6T44-BCSJ>].

192. LONG, *supra* note 185; See also Paul J. De Muniz & Lee N. Gilgan, *Sentenced to Death for Life, Part II* (2016), <https://oadp.org/news/sentenced-to-death-for-life-part-2> [<https://perma.cc/PK39-S5NP>].

executed.¹⁹³ The last executions prior to the 1914 state constitutional ban on the death penalty occurred in 1913.¹⁹⁴ Governor Oswald West commuted the death sentences of John Arthur Pender and Lloyd Wilkins, the two men who were on death row when the voters approved the 1914 measure, to life imprisonment.¹⁹⁵ The first execution following reinstatement of the death penalty in May 1920 occurred November 5, 1920, when Emmett Bancroft was hanged for a murder committed in July of that year.¹⁹⁶ Governor Mark Hatfield commuted the death sentences of the three individuals who were on Oregon's death row in November 1964 when voters rescinded the death penalty and reinstated life imprisonment as punishment for murder.¹⁹⁷ The last person executed before that action was Leroy McGauhey, who died in the gas chamber on August 20, 1962.¹⁹⁸ No later executions would take place in the state until 1996, when Douglas Franklin Wright died by lethal injection.¹⁹⁹

The reach of Oregon's death penalty law was significantly narrowed with the enactment of Senate Bill 1013, which became effective September 29, 2019.²⁰⁰ The bill's provisions "apply to crimes committed before, on or after the effective date of this 2019 Act that are the subject of sentencing proceedings occurring on or after the effective date of this

193. See Bedau, *supra* note 186, at 6 ("Oregon has twice abolished the death penalty, when a total of five persons were under sentence of death (two in 1914, three in 1964), all of whose sentences were promptly commuted . . .").

194. ICPSR: *The Espy File*, *supra* note 29, at Oregon V16(41), V14; DPIC, *Executions in the U.S.*, *supra* note 36, at 306 (Charles Humphrey and George Humphrey were executed March 22, 1913; Frank Seymour and Mike Spanos were executed October 31, 1913; and Oswald Hansel was executed November 17, 1913).

195. LONG, *supra* note 185, at 32–33; Bedau, *supra* note 186, at 6.

196. ICPSR: *The Espy File*, *supra* note 29, at Oregon V16(41), V14; DPIC, *Executions in the U.S.*, *supra* note 36, at 306; Bedau, *supra* note 186, at 20 n.78 (noting that Bancroft, who was unrepresented by counsel and pled guilty and whose case was not appealed, was executed in 1920); DEATH PENALTY ARCHIVE, *Documentation for the Execution of Emmett Bancroft, 1920-11-05*, <https://archives.albany.edu/concern/daos/kd17d714b?locale=en#c=0&m=0&s=0&cv=0&xywh=-586%2C107%2C4619%2C2969> [<https://perma.cc/QHL4-U3Q2>] (murder by Emmett Bancroft committed July 25, 1920).

197. LONG, *supra* note 185, at 53 n.40 ("The three who had their sentences commuted to life imprisonment were Jeannace June Freeman, Larry W. Shipley and Herbert F. Mitchell."); Bedau, *supra* note 186, at 6; *Oregon Death Penalty*, OR. DEPT. OF CORR., *supra* note 191.

198. ICPSR: *The Espy File*, *supra* note 29, at Oregon V16(41), V14; DPIC, *Executions in the U.S.*, *supra* note 36, at 307; LONG, *supra* note 185, at 50–51.

199. ICPSR: *The Espy File*, *supra* note 29, at Oregon V16(41), V14; DPIC, *Executions in the U.S.*, *supra* note 36, at 307; *Execution Database (Oregon)*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/execution-database?filters%5Bstate%5D=Oregon> [<https://perma.cc/4XMP-37P3>] (execution of Douglas Wright, Sept. 6, 1996); *Oregon Death Penalty*, *supra* note 191.

200. Or. S.B. 1013 (Ch. 635, 2019 Laws).

2019 Act.”²⁰¹ Under prior law, the offense of aggravated murder, made punishable by death, was defined as an intentional criminal homicide accompanied by proof of one or more of twelve aggravating factors,²⁰² some of which included subparts, such as specifying multiple victims that defined the murder as being death-penalty eligible.²⁰³ The new law defined aggravated murder more restrictively, by including only five aggravating factors and requiring proof that the killing was “premeditated and committed intentionally” for all but one of those aggravating factors.²⁰⁴ In September 2019, when those statutory changes became

201. *Id.* at § 30.

202. OR. REV. STAT. § 163.115 (2011).

203. OR. REV. STAT. § 163.095 (2011):

(1)(a) The defendant committed the murder pursuant to an agreement that the defendant receive money or other thing of value for committing the murder.

(b) The defendant solicited another to commit the murder and paid or agreed to pay the person money or other thing of value for committing the murder.

(c) The defendant committed murder after having been convicted previously in any jurisdiction of any homicide, the elements of which constitute the crime of murder as defined in ORS 163.115 or manslaughter in the first degree as defined in ORS 163.118.

(d) There was more than one murder victim in the same criminal episode as defined in ORS 131.505.

(e) The homicide occurred in the course of or as a result of intentional maiming or torture of the victim.

(f) The victim of the intentional homicide was a person under the age of 14 years.

(2)(a) The victim was one of the following and the murder was related to the performance of the victim’s official duties in the justice system:

(A) A police officer as defined in ORS 181A.355;

(B) A correctional, parole and probation officer or other person charged with the duty of custody, control or supervision of convicted persons;

(C) A member of the Oregon State Police;

(D) A judicial officer as defined in ORS 1.210;

(E) A juror or witness in a criminal proceeding;

(F) An employee or officer of a court of justice; or

(G) A member of the State Board of Parole and Post-Prison Supervision;

(b) The defendant was confined in a state, county or municipal penal or correctional facility or was otherwise in custody when the murder occurred.

(c) The defendant committed murder by means of an explosive as defined in ORS 164.055.

(d) Notwithstanding ORS 163.115 (1)(b), the defendant personally and intentionally committed the homicide under the circumstances set forth in ORS 163.115 (1)(b).

(e) The murder was committed in an effort to conceal the commission of a crime, or to conceal the identity of the perpetrator of a crime.

(f) The murder was committed after the defendant had escaped from a state, county or municipal penal or correctional facility and before the defendant had been returned to the custody of the facility.

204. OR. REV. STAT. § 163.095 (2020). As used in Or. Rev Stat. § 163.095 (2020) and this section, “aggravated murder” means:

(1) Criminal homicide of two or more persons that is premeditated and committed intentionally and with the intent to:

effective, 31 offenders were on Oregon's death row.²⁰⁵ It currently is unclear whether or how many individuals under sentence of death at the time of the new sentencing legislation's enactment will be affected by the changes.

23. Rhode Island

Legislative repeal Feb. 11, 1852

No post-repeal executions

Legislative enactment of death penalty for murder by life term prisoner, 1872

Legislation mandating death penalty for murder by prisoner, 1973

Judicial invalidation of mandatory death penalty for prisoner, 1979

Legislative repeal of mandatory death penalty for prisoner who kills another prisoner, 1984

The last execution in Rhode Island occurred when John Gordon was hanged on February 14, 1845.²⁰⁶ Controversy surrounding Gordon's

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- (a) Intimidate, injure or coerce a civilian population;
 - (b) Influence the policy of a government by intimidation or coercion; or
 - (c) Affect the conduct of a government through destruction of property, murder, kidnapping or aircraft piracy; or
 - (2) Murder in the second degree, as defined in ORS 163.115, that is:
 - (a)(A) Committed while the defendant was confined in a state, county or municipal penal or correctional facility or was otherwise in custody; and
 - (B) Committed after the defendant was previously convicted in any jurisdiction of any homicide, the elements of which constitute the crime of aggravated murder under this section or murder in the first degree under section 3 of this 2019 Act;
 - (b) Premeditated and committed intentionally against a person under 14 years of age;
 - (c) Premeditated, committed intentionally against a police officer as defined in ORS 801.395, and related to the performance of the victim's official duties; or
 - (d) Premeditated, committed intentionally against a correctional, parole and probation officer or other person charged with the duty of custody, control or supervision of convicted persons, and related to the performance of the victim's official duties.

205. *Death Row U.S.A. Fall 2019*, NAACP LEGAL DEF. & EDUC. FUND, INC. p. 55 (Oct. 1, 2019), <https://www.naacpldf.org/wp-content/uploads/DRUSAFall2019.pdf> [<https://perma.cc/3L92-FT24>].

206. ICPSR: *The Espy File*, *supra* note 29, at Rhode Island V16(44), V14; DPIC, *Executions in the U.S.*, *supra* note 36, at 339 (indicating execution occurred February 13, 1845). Other authorities identify February 14, 1845 as the date of the execution. Philip E. Mackey, *The Result May Be Glorious'—Anti-Gallows Movement in Rhode Island 1836-1852*, 33 R. I. HIST. 19, 23 (Feb. 1974); *The Murder of Amasa Sprague, and the Irishman Persecuted for the Crime*, NEW ENGLAND HIST. SOC'Y, <https://www.newenglandhistoricalsociety.com/murder-amasa-sprague-irishman-persecuted-crime/> [<https://perma.cc/8DCZ-A27R>]; Michael S. Pezzullo, *Book Review, The Hanging and Redemption of John Gordon: The True Story of Rhode Island's Last Execution*, 62 R. I. BAR J. 33, 35 (May/June 2014), https://www.ribar.com/UserFiles/File/May-June_2014_1ml.pdf [<https://perma.cc/M4H5-HA56>]. See *Execution Database, Rhode Island*, DEATH PENALTY INFO.

execution helped stimulate a movement to eliminate capital punishment in the state.²⁰⁷ The movement succeeded when Rhode Island enacted legislation abolishing the death penalty on February 11, 1852.²⁰⁸ Twenty years later, in 1872, a statute was enacted providing for the death penalty for murder committed by a life term prisoner.²⁰⁹ That statute failed to comply with the Supreme Court's decision a century later in *Furman v. Georgia*,²¹⁰ and in 1973 Rhode Island enacted legislation providing for mandatory capital punishment for murder committed by any prisoner.²¹¹ No one was executed under either the 1872 or the 1973 provision. The Rhode Island Supreme Court declared the mandatory death penalty law unconstitutional in 1979,²¹² and subsequent legislation removed the capital punishment provision and provided life imprisonment as the maximum penalty for murder.²¹³

24. South Dakota

Legislative repeal February 15, 1915

No post-repeal executions through reinstatement

Legislative reinstatement, January 27, 1939

First post-reinstatement execution April 8, 1947

South Dakota authorized capital punishment until February 15, 1915, when legislation took effect repealing the state's death penalty law.²¹⁴ The last execution prior to the enactment of the repeal legislation occurred in

CTR., <https://deathpenaltyinfo.org/executions/execution-database?filters%5Bstate%5D=Rhode%20Island> [<https://perma.cc/6VKT-WN2J>] (indicating no executions occurred in Rhode Island 1977 or later).

207. See PAUL F. CARANCI, *THE HANGING AND REDEMPTION OF JOHN GORDON: THE TRUE STORY OF RHODE ISLAND'S LAST EXECUTION* (2013); Patrick T. Conley, *Death Knell for the Death Penalty: The Gordon Murder Trial and Rhode Island's Abolition of Capital Punishment*, 34 R. I. BAR J. 1 (1986); Mackey, *supra* note 206, at 23–24; GALLIHER ET AL., *supra* note 36, at 222.

208. 1852 R.I. PUB. LAWS 12; Mackey, *supra* note 206, at 28 n.2 (citing MS. Journal House Jan. Session 1852, *Acts, Resolves General Assembly* (Providence, 1852) 12).

209. *Id.* at 29; GALLIHER ET AL., *supra* note 36, at 222. See *State v. Cline*, 397 A.2d 1309, 1309 (R.I. 1979).

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

211. R.I. GEN. LAWS § 11-23-2 (1973), cited in *State v. Cline*, 397 A.2d, at 1310; GALLIHER ET AL., *supra* note 36, at 223.

212. *State v. Cline*, 397 A.2d 1309 (R.I. 1979).

213. R.I. GEN. LAWS § 11-23-2 (1984). See *Thompson v. Oklahoma*, 487 U.S. 815, 826 n.1 (1988) (plurality opinion), (citing *State v. Cline*, 387 A.2d 1309 (R.I. 1979) and noting that R.I. GEN. LAWS § 11-23-2 (Supp. 1987) does not authorize the death penalty for murder).

214. Carol Jennings, *State Historical Society Researches Capital Punishment in South Dakota*, <https://history.sd.gov/archives/forms/exhibits/capitolpunishment.pdf> [<https://perma.cc/9XZZ-VS7L>]; 1915 S.D. SESS. LAWS 335; Galliher, et al., *supra* note 41, at 547–49.

1913.²¹⁵ South Dakota remained without capital punishment until 1939, when legislation reinstating the death penalty took effect.²¹⁶ No executions were carried out under this statute until 1947, when George Sitts died in the electric chair as punishment for a 1946 murder.²¹⁷ Six decades passed until the next state execution, which occurred in 2007 pursuant to South Dakota's post-*Furman* death penalty legislation.²¹⁸

25. Tennessee

Legislative repeal of death penalty for murder March 27, 1915, with retention for rape and murder by life term prisoners

No post-repeal executions for murder through reinstatement

Legislative reinstatement of death penalty for murder Jan. 27, 1919

First post-reinstatement execution for murder Sept. 3, 1920

With the exception of a short period in the 1970s following the Supreme Court's decision in *Furman v. Georgia*,²¹⁹ Tennessee has never been without the death penalty.²²⁰ The state did, however, briefly eliminate capital punishment for murder (other than murder committed by life term prisoners), while retaining the death penalty for rape, through

215. ICPSR: *The Espy File*, *supra* note 29, at South Dakota V16(46), V14; DPIC, *Executions in the U.S.*, *supra* note 36, at 359 (execution of Joseph Richman, December 3, 1913); *Frequently Asked Questions, Capital Punishment*, S.D. DEPT. OF CORR., <https://doc.sd.gov/about/faq/capitalpunishment.aspx> [<https://perma.cc/7SRA-QPFW>].

216. 1939 S.D. SESS. LAWS 166; Galliher, et al., *supra* note 41, at 572 & n.244 (citing 1939 S.D. CODIFIED LAWS 30).

217. ICPSR: *The Espy File*, *supra* note 29, at South Dakota V16(46), V14; DPIC, *Executions in the U.S.*, *supra* note 36, at 359 (execution of George Sitts, April 8, 1947); Jennings, *supra* note 214; *Frequently Asked Questions, Capital Punishment*, S. D. DEPT. OF CORR., <https://doc.sd.gov/about/faq/capitalpunishment.aspx> [<https://perma.cc/ZJ64-U2KV>]; Danielle Ferguson, *A History of Capital Punishment in South Dakota*, AP NEWS (Nov. 14, 2019), <https://apnews.com/4fb31a3fb78949ca801691edfbc786b> [<https://perma.cc/E9JG-YWQC>].

218. *Execution Database, South Dakota*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/execution-database?filters%5Bstate%5D=South%20Dakota> [<https://perma.cc/3ENQ-VCZA>] (stating Elijah Page was executed July 11, 2007); *Frequently Asked Questions, Capital Punishment*, S.D. DEPT. OF CORR., <https://doc.sd.gov/about/faq/capitalpunishment.aspx> [<https://perma.cc/4HRC-GHJ4>]. See *State v. Page*, 709 N.W.2d 739 (S.D. 2006). No executions were carried out in South Dakota after George Sitts's 1947 execution until 2007. See ICPSR: *The Espy File*, *supra* note 29, at South Dakota V16(46), V14; DPIC, *Executions in the U.S.*, *supra* note 36, at 359.

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

220. See *Capital Punishment Chronology*, TENN. DEPT. OF CORR., <https://www.tn.gov/content/dam/tn/correction/documents/chronology.pdf> [<https://perma.cc/GQ8V-X76E>].

legislation that became effective March 27, 1915.²²¹ The law discarding capital punishment for murder was repealed January 27, 1919,²²² and thereafter the death penalty was again authorized for that crime. The death penalty's retention for rape was apparently motivated by racial concerns,²²³ and the three executions that occurred during the interim when capital punishment was not available for murder involved Black defendants who had been convicted of rape.²²⁴ The last execution in Tennessee prior to the temporary repeal took place May 9, 1913, for a robbery-murder.²²⁵ The first post-reinstatement execution for murder occurred September 3, 1920,²²⁶ for a murder committed June 19, 1919,²²⁷ *i.e.*, following enactment of the January 27, 1919 reinstatement legislation.

26. Vermont

Legislative repeal for most offenses Apr. 15, 1965

No post-repeal executions

Judicial invalidation by *Furman v. Georgia* (1972)

221. 1915 TENN. PUB. ACTS 181; Galliher, et al., *supra* note 41, at 558 (citing 1915 TENN. PUB. ACTS 181).

222. TENN. PUB. ACTS 5; Galliher, et al., *supra* note 41, at 564 (citing 1919 TENN. PUB. ACTS 5).

223. Galliher, et al., *supra* note 41, at 556–58; MARGARET VANDIVER, *LETHAL PUNISHMENT: LYNCHINGS AND LEGAL EXECUTIONS IN THE SOUTH* 162 (Rutgers U. Press, 2006); STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY*, 221–22 (2002); K. B. Turner & Yolanda Y. Harper, *An Overview of Capital Punishment in Tennessee: Patterns of Legal Executions, 1782-2010*, 49 CRIM. L. BULLETIN (2013); Carol S. Steiker & Jordan M. Steiker, *Capital Punishment: A Century of Discontinuous Debate*, 100 J. OF CRIM. L. & CRIMINOLOGY 643, 649–52 (2010).

224. DPIC, *Executions in the U.S.*, *supra* note 36, at 365 (execution of Julius Morgan, July 13, 1916; execution of Eddie Alsup and J.D. Williams, July 8, 1918); *Tennessee Executions*, TENN. DEPT. OF CORR., <https://www.tn.gov/correction/statistics-and-information/executions/tennessee-executions.html> [<https://perma.cc/JMA2-5VBQ>]. *But see* Galliher, et al., *supra* note 41, at 564 (“During the year prior to reinstatement, there were four legal executions in the state, three rapists and one previously convicted murderer who killed a fellow inmate.”). The authors do not provide a citation in support of this statement, which is inconsistent with the authorities noted above.

225. DPIC, *Executions in the U.S.*, *supra* note 36, at 365 (execution of Pat Mulloy); *see also* ICPSR: *The Espy File*, *supra* note 29, at Tennessee V16(47), V14.

226. DPIC, *Executions in the U.S.*, *supra* note 36, at 366 (execution of Lorenzo Young); *see also* ICPSR: *The Espy File*, *supra* note 29, at Tennessee V16(47), V14; *Tennessee Executions*, TENN. DEPT. OF CORR., <https://www.tn.gov/correction/statistics-and-information/executions/tennessee-executions.html> [<https://perma.cc/3732-NQTG>].

227. *See* DEATH PENALTY ARCHIVE, *Documentation for the execution of Lorenzo Young, 1920-09-03*, <https://archives.albany.edu/concern/daos/j6731b302?locale=en#c=0&m=0&s=0&cv=0&xywh=2075%2C-15%2C7556%2C4857> [<https://perma.cc/9VGB-8WH8>].

No legislative reenactment and legislative designation of life imprisonment as punishment for murder 1987

Vermont has abolished capital punishment and no executions have occurred in the state in its post-abolition era. The last person executed in Vermont was Donald Demag, who died in the electric chair December 8, 1954.²²⁸ The last person sentenced to death in Vermont was Lionel Goyet, following his 1956 conviction for murder.²²⁹ Governor Joe Johnson later commuted Goyet's death sentence to life imprisonment.²³⁰ In 1965 the Vermont Legislature eliminated capital punishment for almost all offenses.²³¹ No attempt was made to reinstate capital punishment following the Supreme Court's decision in *Furman v. Georgia*.²³²

228. ICPSR: *The Espy File*, *supra* note 29, at Vermont V16(50), V14; DPIC, *Executions in the U.S.*, *supra* note 36, at 442; *Execution Database, Vermont*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/execution-database?filters%5Bstate%5D=Vermont> [<https://perma.cc/ATN3-CVT8>] (noting no executions 1977 or later).

229. See *State v. Goyet*, 132 A.2d 623 (Vt. 1957); Wilson Ring, *50 Years Later, Vt. Revisits Executions: Defining 1955 Case Shadows New Trial*, BOS. GLOBE (May 1, 2005), http://archive.boston.com/news/local/massachusetts/articles/2005/05/01/50_years_later_vt_revisits_executions/?page=full [<https://perma.cc/2E27-4UEY>]. A 1962 first-degree murder trial, which entailed a possible capital sentence, resulted in a conviction for second-degree murder. *Id.*

230. Ring, *supra* note 229; *Gov. Johnson Saves Goyet from Chair*, RUTLAND DAILY HERALD p. 1 (Nov. 4, 1957), <https://www.newspapers.com/clip/34807819/gov-johnson-saves-goyet-from-chair/> [<https://perma.cc/UD89-SW6M>]. The governor cited multiple reasons in explanation of his decision to commute the sentence, including a change in Vermont's insanity defense that may have affected Goyet's trial, and also "the abolishment of the mandatory death penalty by the Legislature, a split Supreme Court decision on Goyet's appeal, and a spotless criminal record prior to the murder." *Id.*

231. 1965 Vt. Acts & Resolves 28; Charles S. Lanier, *The Death Penalty in the Northeast*, 10 CRIMINAL JUSTICE POL'Y REV. 7, 18 (1999); *Executions 1930-1965*, U.S. DEPT. OF JUSTICE, NAT'L PRISONER STAT. p. 1 (June 1966) ("The twelfth State to abolish the death sentence was Vermont; on April 15, 1965, Governor Philip H. Hoff signed legislation eliminating the death penalty for the crimes of murder, kidnapping for ransom, treason, and killing or destruction of vital property by a group during wartime."); Michael Mello, *Certain Blood for Uncertain Reasons: A Love Letter to the Vermont Legislature on Not Reinstating Capital Punishment*, 32 VT. L. REV. 765, 768 n.21 (2008); see generally *Vermont Death Penalty Information Center Podcast*, DEATH PENALTY INFO. CTR., <https://files.deathpenaltyinfo.org/legacy/podcast/resources/Vermont.pdf> [<https://perma.cc/7KN6-2PN9>].

232. *Furman v. Georgia*, 408 U.S. 238 (1972). See Mello, *supra* note 231, at 768; GALLIHER ET AL., *supra* note 36, at 224. See *Stanford v. Kentucky*, 492 U.S. 361, 384 n.1 (1988) (Brennan, J., dissenting) ("The 15th State to have rejected capital punishment altogether is Vermont. Vermont repealed a statute that had allowed capital punishment for some murders. See Vt. Stat. Ann., Tit. 13, § 2303 (1974 and Supp.1988). The State now provides for the death penalty only for kidnaping with intent to extort money. § 2403. Insofar as it permits a sentence of death, § 2403 was rendered unconstitutional by our decision in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), because Vermont's sentencing scheme does not guide jury discretion, see Vt. Stat. Ann., Tit. 13, §§ 7101-7107 (1974). Vermont's decision not to amend its only law allowing the death penalty in light of *Furman* and its progeny, in combination with its repeal of its statute permitting capital punishment for murder, leads to the conclusion that the State rejects capital punishment.").

Subsequent legislation, enacted in 1987, established life imprisonment without parole as the maximum punishment for murder.²³³

27. Virginia

Legislative repeal July 1, 2021

No post-repeal executions

The first execution on American soil occurred in Virginia's Jamestown Colony in 1608 when the colony executed George Kendall, who was convicted of espionage, by firing squad.²³⁴ Virginia carried out its last execution on July 6, 2017, lethally injecting William Morva in punishment for two murders.²³⁵ During the more than four centuries spanning those events, Virginia executed more persons than any other jurisdiction in America.²³⁶ The state's lengthy history of administering capital punishment came to an end July 1, 2021, when legislation

233. VT. STAT. ANN. tit. 13, § 2303 (a) (1) (West 2020). See *Death Penalty Information Center PODCAST*, *supra* note 231; Mariessa Dobrick, *History Space: First Use of VT Electric Chair*, BURLINGTON FREE PRESS (Mar. 17, 2018), <https://www.burlingtonfreepress.com/story/news/2018/03/17/history-space-first-use-vt-electric-chair/33032839/> [<https://perma.cc/7PVR-WAYC>]; Lanier, *supra* note 231.

234. John D. Bessler, *Capital Punishment Law and Practices: History, Trends, and Developments*, in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT 19, 19 (James R. Acker, Robert M. Bohm & Charles S. Lanier, eds., Carolina Academic Press, 3d ed. 2014).

235. Associated Press, *Virginia Executes William Morva Using Controversial Three-Drug Mixture*, THE GUARDIAN (July 7, 2017), <https://www.theguardian.com/us-news/2017/jul/07/virginia-executes-william-morva-using-controversial-three-drug-mixture> [<https://perma.cc/5EKJ-V4ZB>]; *Execution Database, Virginia*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/execution-database?filters%5Bstate%5D=Virginia> [<https://perma.cc/W5W7-QWAB>]. Corey Johnson was executed January 14, 2021, for multiple murders committed in Virginia, but he was executed under federal authority. *Id.* See Hailey Fuchs, *U.S. Executes Corey Johnson for 7 Murders in 1992*, N. Y. TIMES (Jan. 15, 2021), <https://www.nytimes.com/2021/01/15/us/corey-johnson-execution.html> [<https://perma.cc/PT7L-GJCP>].

236. Hailey Fuchs, *Virginia Becomes First Southern State to Abolish the Death Penalty*, NEW YORK TIMES (Mar. 24, 2021), <https://www.nytimes.com/2021/03/24/us/politics/virginia-death-penalty.html> [<https://perma.cc/PJL3-EU3A>]; *Virginia Becomes 23d State and the First in the South to Abolish the Death Penalty*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/news/virginia-becomes-23rd-state-and-the-first-in-the-south-to-abolish-the-death-penalty> [<https://perma.cc/9ZME-TFF6>]. Approximately 1,387 individuals were executed in colonial Virginia and during the period of Virginia's statehood. ICPSR: *The Espy File*, *supra* note 29, at Virginia V16(51) (listing 1,361 executions between 1608 and 2002); *Execution Database, Virginia*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/execution-database?filters%5Bstate%5D=Virginia> [<https://perma.cc/4NHP-F4PT>] (listing 26 executions carried out under state law between 2003 and 2017). The 2021 execution of Corey Johnson included in the DPIC listing for Virginia executions was carried out under federal authority. See Fuchs, *supra* note 235.

abolishing the death penalty took effect.²³⁷ Two men were on Virginia's death row when Governor Ralph Northam signed the repeal bill.²³⁸ The new law converted their sentences of death to sentence of life imprisonment without parole, stipulating that "any person under a sentence of death imposed for an offense committed prior to July 1, 2021, who has not been executed by July 1, 2021, shall have his sentence changed to life imprisonment"²³⁹

28. Washington

Legislative repeal March 22, 1913

No executions following repeal through reinstatement

Legislative reinstatement March 14, 1919

First post-reinstatement execution April 1, 1921

Judicial invalidation Oct. 11, 2018

No post-invalidation executions

Washington abolished the death penalty through legislation which took effect March 22, 1913.²⁴⁰ The last execution prior to the repeal of the state's death-penalty law occurred April 21, 1911.²⁴¹ Legislation reinstating the death penalty became effective March 14, 1919.²⁴² No executions occurred during the six-year repeal period. The first execution following reinstatement took place April 1, 1921, when Johann Schmitt was hanged for a murder committed December 23, 1919.²⁴³ Washington retained the death penalty thereafter and re-enacted capital punishment

237. Virginia Senate Bill No. 1165 (Virginia 2021 First Special Session).

238. See Fuchs, *supra* note 236 (identifying the two death-sentenced individuals as Anthony Juniper and Thomas A. Porter). Governor Northam signed the bill repealing the state's death penalty on March 24, 2021. *Id.*

239. Virginia Senate Bill No. 1165 § 3 (Virginia 2021 First Special Session).

240. 1913 Wash. Sess. Laws 581; Galliher, et al., *supra* note 41, at 547 n.61 (citing 1913 Wash. Laws Ch. 167, H.B. 200, at 581).

241. DPIC, *Executions in the U.S.*, *supra* note 36, at 443 (execution of Frederick Jahns); see also ICPSR: *The Espy File*, *supra* note 29 at Washington V16(53), V14.

242. 1919 Wash. Sess. Laws 112; Galliher et al., *supra* note 41, at 567 n.09 (citing 1919 Wash. Sess. Laws 112). See generally Norman S. Hayner & John R. Cranor, *The Death Penalty in Washington State*, 284 ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. 101 (1952) https://www.jstor.org/libproxy.albany.edu/stable/1029448?seq=1#metadata_info_tab_contents [<https://perma.cc/2JZK-V72R>].

243. DPIC, *Executions in the U.S.*, *supra* note 36, at 443; DEATH PENALTY ARCHIVE, *Documentation for the Execution of Johann Schmitt*, <https://archives.albany.edu/concern/daos/c534g365f?locale=en#?c=0&m=0&s=0&cv=0&xywh=-147%2C7%2C4885%2C3140> [<https://perma.cc/3CUF-EEKU>]; see also ICPSR: *The Espy File*, *supra* note 29, at Washington V16(53).

legislation in the wake of *Furman v. Georgia*.²⁴⁴ Five individuals were executed in Washington during the post-*Furman* era, the last one in 2010.²⁴⁵ In 2018, the Washington Supreme Court invalidated the state's death-penalty law, ruling that it had been administered in an arbitrary and racially discriminatory manner in violation of the state constitution.²⁴⁶ Eight individuals were under sentence of death in Washington at the time of that decision,²⁴⁷ and all consequently were resentenced to life imprisonment.²⁴⁸

29. West Virginia

Legislative repeal June 18, 1965

No post-repeal executions

Legislation abolishing the death penalty in West Virginia became effective June 18, 1965.²⁴⁹ By its terms, the law applied prospectively as well as to past death sentences:

Capital punishment is hereby abolished for all offenses against the laws

244. *Furman v. Georgia*, 408 U.S. 238 (1972). See WASH. REV. CODE § 10.95.030 *et seq.* (2014). Washington's post-*Furman* capital punishment legislation took different forms and its sentencing procedures were invalidated on several occasions by the Washington Supreme Court. See *State v. Gregory*, 147 P.3d 621, 628–29 (Wash. 2018).

245. *Execution Database, Washington*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/execution-database?filters%5Bstate%5D=Washington> [<https://perma.cc/GS6G-AVGY>] (Westley Dodd, executed January 5, 1993; Charles Campbell, executed May 27, 1994; Jeremy Sagastegui, executed October 13, 1998; James Elledge, executed August 28, 2001; Cal Brown, executed September 10, 2010).

246. See generally *State v. Gregory*, 147 P.3d 621 (Wash. 2018).

247. *Death Row U.S.A. Fall 2018*, NAACP LEGAL DEF. & EDUC. FUND, INC., p. 59 (Oct. 1, 2018), <https://www.naacpldf.org/wp-content/uploads/DRUSAFall2018.pdf> [<https://perma.cc/ST6N-V4FP>].

248. See *State v. Gregory*, 147 P.3d 621, 642 (Wash. 2018) (“Pursuant to RCW 10.95.090, ‘if the death penalty established by this chapter is held to be invalid by a final judgment of a court which is binding on all courts in the state, the sentence for aggravated first degree murder . . . shall be life imprisonment.’ All death sentences are hereby converted to life imprisonment.”); Paige Cornwell, *List of Inmates Whose Sentences are Changed from Death Row to Life In Prison*, SEATTLE TIMES (Oct. 11, 2018), <https://www.seattletimes.com/seattle-news/list-of-inmates-whose-sentences-are-changed-from-death-row-to-life-in-prison/> [<https://perma.cc/J4CP-XGY8>].

249. 1965 W. Va. Acts 207; GALLIHER ET AL., *supra* note 36, at 193 & n.30 (citing 1965 West Virginia Acts ch. 40 at 204); *Executions 1930-1965*, U.S. DEPT. OF JUSTICE, NAT’L PRISONER STAT., p. 1 (June 1966) (“Governor Hulett C. Smith signed a bill on March 18, 1965, eliminating capital punishment for the offenses of murder, kidnapping for ransom, kidnapping the victim of a crime as a hostage, rape, carnal knowledge, and treason—this measure became effective 90 days after passage, on June 18, 1965.”); Stan Bumgardner & Christine Kreiser, *‘Thy Brother’s Blood’: Capital Punishment*, IX, No. 4 & X, No. 1, W. VA. HIST. SOC’Y Q. (1996), <http://www.wvculture.org/history/wvhs/wvhs941.html> [<https://perma.cc/KRU7-M9X3>] (citing House Bill 517 and noting that it became effective 90 days after Governor Smith signed the bill).

of the state of West Virginia, and no person heretofore or hereafter convicted of any offense in violation of said laws shall be executed, irrespective of whether the crime was committed, the conviction had, or the sentence imposed, before or after the enactment of this section.²⁵⁰

Ernest Stevenson was under sentence of death when the repeal legislation was signed in March 1965,²⁵¹ but Governor Hulett C. Smith announced that he would commute his sentence and Stevenson was not executed.²⁵² The last West Virginia execution, that of Elmer Bruner for a murder committed in 1957, took place in 1959.²⁵³

30. Wisconsin

Legislative repeal July 12, 1853
No post-repeal executions

Wisconsin abolished the death penalty through legislation that took effect July 12, 1853.²⁵⁴ The last person executed in the state was John McCaffary, who was hanged on August 21, 1851, before a crowd of an estimated 2,000 to 3,000 onlookers, for murdering his wife by drowning

250. W. VA. CODE § 61-11-2 (1965).

251. See *State v. Stevenson*, 127 S.E.2d 638 (W. Va. 1962), *cert. denied*, 372 U.S. 938 (1963).

252. *States Seek End of Death Penalty*, N.Y. TIMES p.23 (Mar. 8, 1965), <https://timesmachine.nytimes.com/timesmachine/1965/03/08/101533072.html?pageNumber=23> [<https://perma.cc/65A4-LFHS>] (“There is only one prisoner in the state [of West Virginia] now sentenced to death. He is Ernest Stevenson, 27 years old, who was convicted four years ago of killing a seafood market-employee [sic] in Huntington. Governor Smith has said that he will commute Stevenson’s sentence if the Legislature abolishes the death penalty.”); Bumgardner & Kreiser, *supra* note 249 (“Appeals saved the life of [a] Huntington man, Ernest Stevenson. Convicted of murder in 1961, Stevenson was still awaiting execution when the state abolished the death penalty in 1965.”).

253. See *State v. Bruner*, 105 S.E.2d 140 (W. Va. 1958); DPIC, *Executions in the U.S.*, *supra* note 36, at 450 (execution of Elmer Bruner, April 3, 1959); Bumgardner & Kreiser, *supra* note 249 (“The state acted in the role of executioner for the final time on April 3, 1959. Elmer David Bruner was convicted of murdering a wealthy Huntington woman during a break-in on May 27, 1957.”). *But see* ICPSR: *The Espy File*, *supra* note 29, at West Virginia, V16(54), V14 (erroneously listing execution in 2000 in West Virginia, following a 1959 execution); There were no executions after 1977. *Execution Database, West Virginia*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/execution-database?filters%5Bstate%5D=West%20Virginia> [<https://perma.cc/22RP-TCT9>].

254. 1853 Wis. Sess. Laws 100–01; GALLIHER ET AL., *supra* note 36, at 36 (citing Assembly Bill 67 (1853)). The repeal legislation provided: “Section 1. In all convictions under the statutes of this State, for the crime of murder in the first degree, the penalty shall be imprisonment in the state prison, during the life of the person so convicted; and the punishment for death, for such offence, is hereby abolished. Sec. 2. All acts and parts of acts, contravening the provisions of this act, are hereby repealed. Approved, July 12, 1853.” 1853 Wisconsin Session Laws 100–01, <http://docs.legis.wisconsin.gov/1853/related/acts/103.pdf> [<https://perma.cc/2SJW-DDQA>].

her.²⁵⁵ Wisconsin has not re-enacted death-penalty legislation and no later executions have occurred in the state.²⁵⁶

III. INTERNATIONAL PRACTICE: ABOLITION AND POST-ABOLITION EXECUTIONS

The Supreme Court has deemed “the climate of international opinion”²⁵⁷ to be of interest in its determination of the constitutionality of capital punishment for different crimes and offenders. While ruling in *Roper v. Simmons* that the Constitution prohibits the execution of offenders younger than 18 at the time of their crimes, Justice Kennedy’s majority opinion explained that “at least from the time of the Court’s decision in *Trop [v. Dulles]*, the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment’s prohibition against ‘cruel and unusual punishments.’”²⁵⁸ The laws enacted in other countries may not be explicit about whether executions can or should be carried out following

255. ICPSR: *The Espy File*, *supra* note 29, at Wisconsin, V16(55), V14; DPIC, *Executions in the U.S.*, *supra* note 36, at 445. *See also* GALLIHER ET AL., *supra* note 36, at 35 (citing Carrie Cropley, *The Case of John McCaffary*, WIS. MAG. OF HIST. 35 (State Historical Society 288 (1951)); *The Death Penalty in Wisconsin*, WIS. HIST. SOC’Y, <https://www.wisconsinhistory.org/Records/Article/CS2816> [<https://perma.cc/29A8-86LR>]; *Murderer’s Execution Restraints*, WIS. HIST. SOC’Y, <https://www.wisconsinhistory.org/Records/Article/CS2783> [<https://perma.cc/E5FY-X3UD>].

256. ICPSR: *The Espy File*, *supra* note 29, at Wisconsin, V16(55), V14; DPIC, *Executions in the U.S.*, *supra* note 36, at 445; *Execution Database, Wisconsin*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/execution-database?filters%5Bstate%5D=Wisconsin> [<https://perma.cc/N47L-TD9U>] (no executions 1977 or later).

257. *Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1977) (plurality opinion) (citing *Trop v. Dulles*, 356 U.S. 86, 102 (1958) (plurality opinion)).

258. *Roper v. Simmons*, 543 U.S. 551, 575 (2005) (citing and quoting *Trop v. Dulles*, 356 U.S. 86, 102–03 (1958)) (plurality opinion) (“The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime.”). The opinion continued:

[S]ee also *Atkins [v. Virginia]*, 536 U.S. 304, 317, n. 21 (2002)] (recognizing that “within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved”); *Thompson [v. Oklahoma]*, 487 U.S. 815, 830–831, and n. 31 (1988)] (plurality opinion) (noting the abolition of the juvenile death penalty “by other nations that share our Anglo-American heritage, and by the leading members of the Western European community,” and observing that “[w]e have previously recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual”); *Enmund [v. Florida]*, 458 U.S. 782, 796–797, n. 22 (1982)] (observing that “the doctrine of felony murder has been abolished in England and India, severely restricted in Canada and a number of other Commonwealth countries, and is unknown in continental Europe”); *Coker [v. Georgia]*, 433 U.S. 584, 596, n. 10 (1977)] (plurality opinion) (“It is . . . not irrelevant here that out of 60 major nations in the world surveyed in 1965, only 3 retained the death penalty for rape where death did not ensue”).

Id. at 575–76.

the abolition of capital punishment, but the actual practices are much clearer. It does not appear that executions in other countries, including Canada, Great Britain, throughout Europe, or elsewhere in the world, have gone forward under such circumstances.

A. *Canada*

Canada abolished its death penalty through legislation that became effective July 26, 1976.²⁵⁹ The last executions in Canada occurred December 11, 1962, when two men were hanged for separate murders.²⁶⁰ Following those executions, “all death sentences were commuted by the government of the day.”²⁶¹ Among those spared execution was Mario Gauthier, who had been sentenced to death May 14, 1976, or slightly more than two months before the abolition legislation was enacted.²⁶²

B. *The United Kingdom*

On November 9, 1965, the Murder (Abolition of the Death Penalty) Act 1965²⁶³ became effective, suspending capital punishment for murder

259. *Abolition of the Death Penalty 1976*, CORR. SERV. CAN., <https://www.csc-ccc.gc.ca/text/pblct/rht-drt/08-eng.shtml> [<https://perma.cc/B9Z5-8W74>]. See also Paul Gendreau & Wayne Renke, *Capital Punishment*, THE CANADIAN ENCYCLOPEDIA (2016), <https://www.thecanadianencyclopedia.ca/en/article/capital-punishment> [<https://perma.cc/7Q34-4P2Z>] (noting that, “In 1998, Canada eliminated the death penalty for military members, thus becoming a fully abolitionist country when it comes to state executions.”).

260. Richard Clark, *Executions in Canada, from 1860 to Abolition*, CAP. PUNISHMENT U.K., <http://www.capitalpunishmentuk.org/canada.html> [<https://perma.cc/E2X6-2LMV>] (noting that Arthur Lewis and Ronald Turpin were executed December 11, 1962). See also *Abolition of the Death Penalty 1976*, CORR. SERV. CAN., <https://www.csc-ccc.gc.ca/text/pblct/rht-drt/08-eng.shtml> [<https://perma.cc/E9U9-2VFJ>].

261. *Abolition of the Death Penalty 1976*, CORR. SERV. CAN., <https://www.csc-ccc.gc.ca/text/pblct/rht-drt/08-eng.shtml> [<https://perma.cc/E9U9-2VFJ>]. See also *Prisoners Sentenced to Death in Canada, 1867-1976, An Inventory of Case Files in the Fonds of the Department of Justice*, NAT’L ARCHIVES OF CAN. 27 (1994), <https://data2.archives.ca/pdf/pdf001/p000001052.pdf> [<https://perma.cc/H8JU-QG3H>] (identifying 11 offenders not executed because of “abolishment of death penalty.”).

262. Richard Clark, *Executions in Canada, from 1860 to Abolition*, CAP. PUNISHMENT U.K., <http://www.capitalpunishmentuk.org/canada.html> [<https://perma.cc/YHG7-55K6>]; *Prisoners Sentenced to Death in Canada, 1867-1976, An Inventory of Case Files in the Fonds of the Department of Justice*, NAT’L ARCHIVES OF CAN. 132 (1994), <https://data2.archives.ca/pdf/pdf001/p000001052.pdf> [<https://perma.cc/BP4W-9NSD>].

263. Murder (Abolition of Death Penalty) Act 1965, 1965 c. 71:

An Act to abolish capital punishment in the case of persons convicted in Great Britain of murder or convicted of murder or a corresponding offence by court-martial and, in connection therewith, to make further provision for the punishment of persons so convicted.

1 Abolition of death penalty for murder.

(1) No person shall suffer death for murder, and a person convicted of murder shall . . . be

for a period of five years and instead mandating life imprisonment for that offense. The Act applied in England, Scotland, and Wales. Parliament made the abolition of the death penalty for murder permanent in 1969. The death penalty subsequently was abolished in the United Kingdom for all other crimes, including arson in the Royal Dockyards, high treason, piracy, and military offenses.²⁶⁴ At the time the 1965 Act went into effect, 17 men were under sentence of death in Britain, including David Steven Chapman, whose sentence was imposed November 1, 1965, or just eight days prior to the Act's effective date. With the passage of the Act, all 17 offenders had their sentences reprieved and none were executed.²⁶⁵ The last two executions in England occurred August 13, 1964; the last execution in Scotland took place August 15, 1963; the last execution in Northern Ireland was carried out December 20, 1961; and the last execution in Wales occurred May 6, 1958.²⁶⁶

sentenced to imprisonment for life. . . .

(3) For the purpose of any proceedings on or subsequent to a person's trial on a charge of capital murder, that charge and any plea or finding of guilty of capital murder shall be treated as being or having been a charge, or a plea or finding of guilty, of murder only; and if at the commencement of this Act a person is under sentence of death for murder, the sentence shall have effect as a sentence of imprisonment for life.

UK Legislation, Murder (Abolition of Death Penalty) Act 1965, <http://www.legislation.gov.uk/ukpga/1965/71> [<https://perma.cc/G892-RCUP>].

264. Julian B. Knowles, *The Abolition of the Death Penalty in the United Kingdom: How It Happened and Why It Still Matters*, THE DEATH PENALTY PROJECT: LONDON, 53–56 (2015), <https://www.deathpenaltyproject.org/wp-content/uploads/2017/12/DPP-50-Years-on-pp1-68-1.pdf> [<https://perma.cc/V9EE-TNAQ>]. See also Frederick C. Millett, *Will the United States Follow England (and the Rest of the World) in Abolishing Capital Punishment?*, 6 PIERCE L. REV. 547 (2008); Richard Clark, *Timeline of Capital Punishment in Britain*, CAP. PUNISHMENT U.K., <http://www.capitalpunishmentuk.org/timeline.html> [<https://perma.cc/2J2P-26GE>].

265. Richard Clark, *The Abolition of Hanging in Britain*, CAP. PUNISHMENT U.K., <http://www.capitalpunishmentuk.org/abolish.html> [<https://perma.cc/CTA5-8Z9K>]; Knowles, *supra* note , at 53.

266. Knowles, *supra* note , at 50 (footnotes omitted):

The last executions in England (and the United Kingdom) took place on 13 August 1964. Peter Anthony Allen was hanged at Walton Prison in Liverpool and Gwynne Owen Evans was hanged at Strangeways Prison in Manchester, both for the murder of John Alan West on 7 April 1964. The last execution in Scotland was that of Henry John Burnett on 15 August 1963 in Craiginches Prison, Aberdeen, for the murder of seaman Thomas Guyan. The last execution in Northern Ireland was that of Robert McGladdery at Crumlin Road Gaol, Belfast, on 20 December 1961, for the murder of Pearl Gamble. The last execution in Wales was that of Vivian Teed in Swansea on 6 May 1958, for the murder of William Williams.

Id. at 51 (footnote omitted):

The last person sentenced to death in the United Kingdom was 19-year-old William Holden in 1973 for the capital murder of a British soldier during the Troubles. His sentence was commuted to life imprisonment in 1973, and in 2012 his conviction was quashed by the Court of Appeal of Northern Ireland on the basis of fresh evidence that showed he may have been questioned unlawfully.

C. *Europe and Other Countries Worldwide*

The post-abolition execution practices of countries throughout Europe and elsewhere appear to be consistent with those of Canada and the United Kingdom. Although the data are more difficult to confirm, which makes their reliability less certain, information compiled and made available by Amnesty International and other sources suggests that, historically, executions have not occurred worldwide following the repeal of capital punishment laws.²⁶⁷ Information is provided in the chart below indicating when capital punishment was abolished in the several countries noted, and when the last executions took place in those countries. No countries reported carrying out executions after abolishing capital punishment.

Europe

Country	Date of Abolition Ordinary Crimes ²⁶⁸	Date of Abolition All Crimes	Last Execution
Albania	September 2000	2007	June 25, 1992
Andorra	1990	1990	Oct. 18, 1943
Armenia	2003	2003	Feb. 1991
Austria	June 30, 1950	February 1968	March 24, 1950
Belgium	Aug. 1, 1996	Aug. 1, 1996	August 1950 (1863 – civilian)
Bosnia-Herzegovina	Nov. 1998	Nov. 1998	1975
Bulgaria	Dec. 12, 1998	Dec. 12, 1998	Nov. 4, 1989
Croatia	1990	1990	Feb. 1987

See also Richard Clark, *The End of Capital Punishment in Europe*, CAP. PUNISHMENT U.K., <http://www.capitalpunishmentuk.org/europe.html> [https://perma.cc/8R39-4L9B].

267. *Abolitionist and Retentionist Countries as of July 2018*, AMNESTY INT’L (July 2018), <https://www.amnesty.org/download/Documents/ACT5066652017ENGLISH.pdf> [https://perma.cc/9N4D-CMUK]; Richard Clark, *Capital Punishment in the British Commonwealth*, CAP. PUNISHMENT U.K., <http://www.capitalpunishmentuk.org/common.html> [https://perma.cc/EZU2-592R]; Richard Clark, *The End of Capital Punishment in Europe*, CAP. PUNISHMENT U.K., <http://www.capitalpunishmentuk.org/europe.html> [https://perma.cc/Z2P8-HLSD].

Countries for which specific information about the date of last execution is not provided are not included in the above tables. See also ROGER HOOD & CAROLYN HOYLE, *THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE* (5th ed. 2015); Roger Hood & Carolyn Hoyle, *Abolishing the Death Penalty Worldwide: The Impact of a ‘New Dynamic*, 38 CRIME & JUSTICE 1 (2009); Stefanie Neumeier & Wayne Sandholtz, *The Transnational Legal Ordering of the Death Penalty*, 4 UC IRVINE J. OF INT’L, TRANS. & COMP. L. 124 (2019).

268. While identifying countries that have abolished capital punishment for “ordinary crimes only,” Amnesty International explains that some countries’ “laws provide for the death penalty only for exceptional crimes such as crimes under military law or crimes committed in exceptional circumstances.” *Amnesty International Global Report: Death Sentences and Executions*, AMNESTY INT’L 55 (2020), <https://www.justice.gov/file/1272316/download> [https://perma.cc/K4AL-9T7V].

Cyprus	Dec. 15, 1983	April 19, 2002	June 13, 1962
Czech Republic	July 1, 1990	July 1, 1990	June 8, 1989
Denmark	1933	1993	1892 (civilian) 1950 (war crimes)
Estonia	March 18, 1998	March 18, 1998	Sept. 11, 1991
Finland	May 5, 1972	Dec. 2, 1959	1943 (civilian) 1944 (war crime)
France	Oct. 1981	Oct. 1981	Sept. 10, 1977
Georgia	Nov. 11, 1997	Nov. 11, 1997	1995
Germany			
East Germany	Dec. 18, 1987	Dec. 18, 1987	1975 (murder) 1981 (treason)
West Germany	Dec. 18, 1987	Dec. 18, 1987	1949 (murder) 1951 (military)
Gibraltar	Nov. 8, 1965	Nov. 8, 1965	1931 (murder) 1944 (war crime)
Greece	Dec. 1993	2004	Aug. 25, 1972
Hungary	Oct. 24, 1990	Oct. 24, 1990	July 14, 1988
Iceland	1928	Feb. 12, 1940	Jan. 12, 1830
Ireland	July 11, 1990	July 11, 1990	Apr. 20, 1954
Italy	Dec. 22, 1947 ²⁶⁹	1994	March 4, 1947 (ordinary) March 5, 1947 (war crimes)
Latvia	April 15, 1999	2012	Jan. 1996
Liechtenstein	1979	Jan. 1, 1989	Feb. 26, 1785
Lithuania	Dec. 21, 1998	Dec. 21, 1998	July 12, 1995
Luxembourg	May 17, 1949	May 17, 1949	Aug. 7, 1948 (murder) Feb. 24, 1949 (war crime)
Macedonia	1991	1991	1988
Malta	Oct. 4, 1971	March 21, 2000	July 5, 1943
Moldava	Feb. 21, 1996	Feb. 21, 1996	1985
Monaco	Dec. 17, 1962	Dec. 17, 1962	1847
Montenegro	June 18, 2002		Jan. 29, 1981
Netherlands	Sept. 17, 1870	April 11, 1982	Oct. 31, 1860 (murder) March 21, 1952 (war crime)
Norway	Jan. 1, 1905	1979	Feb. 25, 1876 (murder) Aug. 29, 1948 (war crime)
Poland	Sept. 1, 1998	Sept. 1, 1998	Apr. 21, 1988
Portugal	July 1, 1867	April 1977	Apr. 22, 1846 (murder) During WWI (war crimes)
Romania	Jan. 7, 1990	Jan. 7, 1990	Dec. 25, 1989

269. Art. 27 Costituzione [Cost.] (It.). <https://www.gazzettaufficiale.it> [<https://perma.cc/XGS7-85N5>].

Serbia	Nov. 5, 2001	Nov. 5, 2001	Feb. 1992
Slovenia	Sept. 1989	Sept. 1989	1959
Spain	Dec. 23, 1978	Nov. 14, 1995	Sept. 27, 1975
Sweden	June 3, 1921	July 1, 1973	Nov. 23, 1910
Switzerland	Jan. 1, 1942	1992	Oct. 18, 1940 (murder) Dec. 7, 1944 (war crime)
Turkey	Aug. 8, 2002	2004	1983 (murder) Oct. 25, 1984 (military)
Ukraine	March 22, 2000	March 22, 2000	March 11, 1997
Uzbekistan	2008	2008	2005
Vatican City	1969	1969	July 9, 1870

Non-European Countries

Country	Date of Abolition Ordinary Crimes	Date of Abolition All Crimes ²⁷⁰	Last Execution
Australia	1984	1985	1967
Benin	2016	2016	1987
Bhutan	2004	2004	1964
Bolivia	1997	2009	1974
Brazil	1979		1855
Burkina Faso	2018		1988
Cape Verde	1981	1981	1835
Chile	2001		1985
Colombia	1910	1910	1909
Congo (Republic of)	2015	2015	1982
El Salvador	1983		1973
Fiji	1979	2015	1964
Gabon	2010	2010	1985
Guatemala	2017		2000
Guinea	2016	2017	2001
Guinea-Bissau	1993	1993	1986
Haiti	1982	1982	1972
Honduras	1956	1956	1940
Israel	1954		1962 (war crimes)
Madagascar	2015	2015	1958
Mauritius	1995	1995	1987
Mexico	2005	2005	1961
Mongolia	2017	2017	2008
Mozambique	1990	1990	1986
Namibia	1990	1990	1988
Nepal	1990	1997	1979
New Zealand	1961	1989	1957

270. Amnesty Int'l, supra note 268

Nicaragua	1979	1979	1930
Panama	1922	1922	1903
Paraguay	1992	1992	1928
Peru	1979		1979
Philippines	2006	2006	2000
Rwanda	2007	2007	1998
San Marino	1848	1865	1468
Senegal	2004	2004	1967
South Africa	1995	1997	1991
Suriname	2015	2015	1982
Togo	2009	2009	1978

IV. JUVENILES AND THE DEATH PENALTY

A final inquiry concerns the status of juvenile offenders, age 17 or younger, who were sentenced to death in states that later raised the minimum age of death-eligibility to 18. We limit this inquiry to occurrences prior to the Supreme Court's 2005 ruling in *Roper v. Simmons*,²⁷¹ which took the decision about executions for these offenders away from the states. *Roper* established the constitutional floor for death-penalty eligibility as age 18 at the time of offense. Although sentenced under laws authorizing their execution, no juveniles who committed their crimes while younger than 18 were executed in the states that later raised the age of capital punishment eligibility to 18 before *Roper* was decided and would have spared them.²⁷²

In *Thompson v. Oklahoma* (1988), the Supreme Court held that the Eighth Amendment prohibits capital punishment for offenders age 15 or younger at the time they committed their crimes.²⁷³ At that time, 11 states specified 18 as the minimum age for death-penalty-eligibility in their capital punishment statutes.²⁷⁴

271. 543 U.S. 551 (2005).

272. All offenders who committed their crimes before age 18 and still remained on death row at the time *Roper* was decided were spared by *Roper* regardless of state-law changes because U.S. Supreme Court jurisprudence makes retroactive new substantive constitutional rules "prohibiting a certain category of punishment for a class of defendants because of their status or offense." *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989).

273. *Thompson v. Oklahoma*, 487 U.S. 815, 826 n. 25 (1988) (plurality opinion).

274. *Id.* at 829 n. 30 (1988) (plurality opinion) ("California (Cal. Penal Code Ann. § 190.5 (West 1988)) (age 18); Colorado (COLO. REV. STAT. § 16-11-103(1)(a) (1986)) (age 18); Connecticut (CONN. GEN. STAT. § 53a-46a(g)(1) (1985)) (age 18); Illinois (Ill. Rev. Stat., ch. 38, ¶ 9-1(b) (1987)) (age 18); Maryland (MD. ANN. CODE, Art. 27, § 412(f) (1988)) (age 18); Nebraska (NEB. REV. STAT. § 28-105.01 (1985)) (age 18); New Jersey (N.J. Stat. Ann. §§ 2A:4A-22(a) (1987), 2C:11-3(g) (West Supp. 1988)) (age 18); New Mexico (N.M. STAT. ANN. §§ 28-6-1(A), 31-18-14(A) (1987)) (age 18); Ohio (OHIO REV. CODE ANN. § 2929.02(A) (1984)) (age 18); Oregon (ORE. REV. STAT. §§ 161.620,

The year following the decision in *Thompson*, in *Stanford v. Kentucky* (1989),²⁷⁵ the justices ruled that the Eighth Amendment did not preclude the capital punishment of 16 and 17-year-old offenders. At the time of the Court's decision in *Stanford*, 12 death-penalty states specified 18 as the minimum age for death-eligibility.²⁷⁶

In *Roper v. Simmons* (2005),²⁷⁷ the Court held that executing offenders who committed their crimes while younger than age 18 no longer comported with the Eighth Amendment's prohibition against cruel and unusual punishments, thus abrogating *Stanford v. Kentucky*. By that time, even though *Stanford* had permitted states to execute offenders who were under 18 at the time of their offense, five more states that had previously permitted such punishments – Indiana, Montana, South Dakota, Washington, and Wyoming – abolished the practice.²⁷⁸ More than seventy juveniles were under sentence of death, in 13 states, at the time of this decision.²⁷⁹ Six states had executed offenders who had committed murder before turning 18 in the 16 years since *Stanford* was decided.²⁸⁰ However, none of those executions occurred in a state that had raised its

419.476(1) (1987)) (age 18); Tennessee (TENN. CODE ANN. §§ 37-1-102(3), (4), 37-1-103, 37-1-134(a)(1) (1984 and Supp.1987)) (age 18).”)

275. *Stanford v. Kentucky*, 492 U.S. 361 (1989).

276. *Id.* at 370–71 & n. 2 (1989) (“The following States preclude capital punishment of offenders under 18: California (CAL. PENAL CODE ANN. § 190.5 (West 1988)); Colorado (COLO. REV. STAT. § 16-11-103(1)(a) (1986)); Connecticut (CONN. GEN. STAT. § 53a-46a(g)(1) (1989)); Illinois (ILL. REV. STAT., ch. 38, ¶ 9-1(b) (1987)); Maryland (MD. ANN., CODE, Art. 27, § 412(f) (Supp.1988)); Nebraska (NEB. REV. STAT. § 28-105.01 (1985)); New Hampshire (N.H. REV. STAT. ANN. § 630:5(XIII) (Supp.1988)); New Jersey (N.J. STAT. ANN. § 2A:4A-22(a) (West 1987) and 2C:11-3(g) (West Supp.1988)); New Mexico (N.M. STAT. ANN. §§ 28-6-1(A), 31-18-14(A) (1987)); Ohio (OHIO REV. CODE ANN. § 2929.02(A) (1987)); Oregon (ORE. REV. STAT. §§ 161.620 and 419.476(1) (1987)); Tennessee (TENN. CODE ANN. §§ 37-1-102(3), 37-1-102(4), 37-1-103, 37-1-134(a)(1) (1984 and Supp.1988).”)

277. *Roper v. Simmons*, 543 U.S. 551 (2005).

278. *Id.* at 564, 579–80 (App. B). *See also* Brief for Respondent at 38–41, *Roper v. Simmons*, 2004 WL 1947812 (U.S.), (“When *Stanford* was decided, 11 states set the minimum age for the death penalty at 18. Since *Stanford*, seven additional states and the federal government have done so. Specifically, in 1993, the Supreme Court of Washington construed its death-penalty statute not to permit the execution of those under 18 at the time of the offense. *See State v. Furman*, 858 P.2d 1092, 1103 (Wash. 1993). When Kansas reinstated the death penalty in 1994, it set the minimum age at 18. *See KAN. STAT. ANN. § 21-4622*. New York likewise set the minimum age at 18 when it reinstated the death penalty in 1995. *See N.Y. PENAL LAW § 125.27*. Montana established a statutory minimum age of 18 in 1999, *see MONT. CODE ANN. § 45-5-102*, as did Indiana in 2002, *see IND. CODE ANN. § 35-50-2-3*. Most recently, in March of this year both Wyoming and South Dakota raised the minimum age for the death penalty to 18. *See WYO. STAT. ANN. § 6-2-101(b)*; S.D. CODIFIED LAWS § 23A-27A-42.”) (internal footnotes omitted).

279. *Roper v. Simmons*, 543 U.S. at 596 (O'Connor, J., dissenting) (“In all, there are currently over 70 juvenile offenders on death row in 12 different States (13 including respondent).”) (internal citation omitted).

280. *Id.* at 595 (O'Connor, J., dissenting) (internal citation omitted).

minimum age of death penalty-eligibility to 18 after previously authorizing juvenile offenders to be sentenced to death.²⁸¹ The only states with juvenile offenders under sentence of death on February 28, 2005, the date *Roper v. Simmons* was decided, were those retaining laws authorizing the capital punishment of 16 or 17-year-old offenders.²⁸²

It thus appears that no juveniles who were sentenced to death in states that originally authorized capital punishment for 16- or 17-year-old offenders, but subsequently raised the minimum age for death-eligibility to 18 prior to the Supreme Court's decision in *Roper v. Simmons*, remained under sentence of death when *Roper* was decided, or were executed after relevant state laws raised the minimum age.

V. CONCLUSION

Debates about the retention or abolition of death-penalty laws have intensified recently throughout the country. Points of contention tend to center on disputed principles of justice, morality, and disagreements about the costs and benefits of capital punishment. While debates continue, more than 2,600 individuals currently remain on the nation's death rows.²⁸³ As the more abstract policy issues dominate discussions about the future of the death penalty, the fate of those awaiting execution looms in the background. If capital punishment is abolished, the question of whether the current denizens of death row should be executed pursuant to the law in effect when they committed their crimes, or whether they

281. The six states in which offenders were executed after *Stanford v. Kentucky* was decided, who were younger than 18 when they committed their crimes, were Louisiana, Texas, Missouri, Georgia, Virginia, and Oklahoma. Victor L. Streib, *The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes, January 1, 1973-February 28, 2005*, OHIO N. U., <https://files.deathpenaltyinfo.org/legacy/documents/StreibJuvDP2005.pdf> [https://perma.cc/RE2L-KTDH]. The five states that had renounced capital punishment for offenders younger than 18 since *Stanford v. Kentucky* was decided were Indiana, Montana, South Dakota, and Wyoming, by statute, and Washington, by judicial decision.

282. The states authorizing capital punishment for offenders who committed their crimes while juveniles were Alabama, Arizona, Arkansas, Delaware, Florida, Georgia, Idaho, Kentucky, Louisiana, Mississippi, Missouri, Nevada, New Hampshire, North Carolina, Oklahoma, Pennsylvania, South Carolina, Texas, Utah, and Virginia. *Roper v. Simmons*, 543 U.S. 551, 579 (App. A) (2005). The states with juvenile offenders under sentence of death when *Roper* was decided were Alabama (13); Arizona (4), Florida (3), Georgia (2), Louisiana (4), Mississippi (5), Nevada (1) North Carolina (4), Pennsylvania (2), South Carolina (3), Texas (29), and Virginia (1). *Case Summaries of Juvenile Offenders Who Were on Death Row in the United States*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/stories/case-summaries-of-juvenile-offenders-who-were-on-death-row-in-the-united-states> [https://perma.cc/L5NH-XVQG].

283. *Death Row U.S.A. Winter 2020*, NAACP LEGAL DEF. & EDUC. FUND, INC., p. 1 (2020), <https://www.naacpldf.org/wp-content/uploads/DRUSAWinter2020.pdf> [https://perma.cc/SRJ3-TBZF].

should be spared execution because the law no longer permits death sentences to be imposed must be confronted.

Although disagreements about the purposes and fair administration of criminal punishment, political considerations, the interests of murder victims' survivors, and other factors combine to make answers to this question elusive, in practice, the issue has been resolved with striking uniformity. Historically, in this country and throughout the world, the apparent universal practice has been to spare individuals from execution if they are under sentence of death at the time capital punishment laws are repealed or invalidated. Despite the principled, political, and pragmatic disagreements about execution policies following the repeal or judicial invalidation of death-penalty legislation, these actions speak loudly, and quite arguably more loudly than words, as actions often do.