

The State of Capital Punishment

BY AMBER WIDGERY

Increasingly, capital punishment legislation being considered in state legislatures across the nation is focused on concerns over cost, viable methods of execution, intellectual disability, and lengthy trial and appellate procedures.¹ These concerns have prompted changes to capital punishment policy and process and even, on occasion, been sufficient for states to abandon the policy altogether.

Legislative Trends

Intellectual Disability

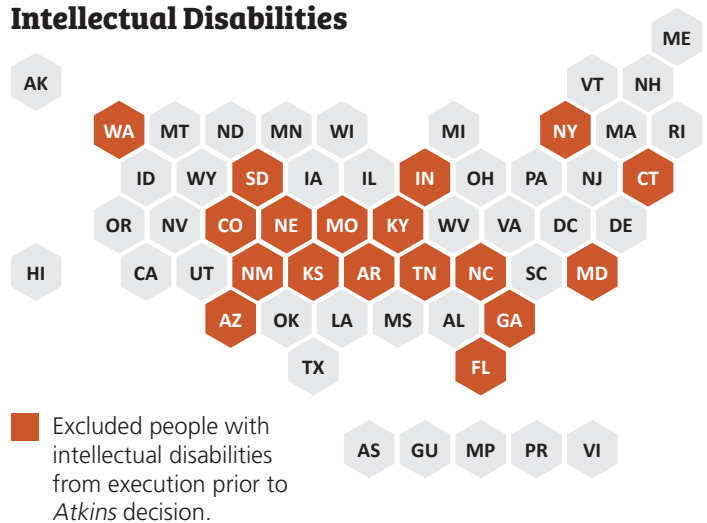
Several U.S. Supreme Court rulings over the past two decades have narrowed the death penalty’s application in the states. Based on the Eighth Amendment’s ban on cruel and unusual punishment, the high court abolished the death penalty for intellectually disabled offenders in 2002, for juvenile offenders in 2005 and, in 2008, for raping a child when death is not the intended or actual result.

The 2002 *Atkins v. Virginia* decision categorically excluded individuals with intellectual disabilities from being eligible for capital punishment. This decision was largely driven by state legislative trends at the time and has had possibly the most significant impact on the states since it was decided.

Just 13 years prior to the *Atkins* decision, the U.S. Supreme Court, in *Penry v. Lynaugh*, declined to ban death sentences for individuals with intellectual disability. The court’s opinion in *Atkins* recognized this change in course by pointing to momentum in the states to statutorily exclude these individuals. In the intervening years between decisions, 18 states had enacted an exclusion. The court left it to the states to craft standards for determining who qualified for exclusion.

Atkins forced many states to amend their laws, but the lack of a clear standard for determining intellectual disability led to additional litigation. Subsequent U.S. Supreme Court cases struck

Capital Punishment and People with Intellectual Disabilities



Source: *Atkins v. Virginia*, 2002

down statutes adopted by Florida and Texas.² Since 2015, at least nine state enactments have modernized language related to the standard for exclusion.

Methods of Execution

Lethal injection is currently the primary method of execution in all 29 states that allow capital punishment. Texas was the first state to use the method, in 1982.

In a 2008 case, *Baze v. Rees*, the U.S. Supreme Court approved a three-drug combination of (1) sodium thiopental, a sedative that induces unconsciousness, (2) pancuronium bromide, a muscle relaxer that induces paralysis, stopping respiration, and (3) potassium chloride, which causes cardiac arrest.

This was the same three-drug combination that was used in the first lethal injection execution, and at the time of the *Baze* opinion 30

states were using that exact mixture. The court’s opinion also made it apparent that “substantially similar” drug combinations would be legally acceptable.

Since the *Baze* opinion, lethal injection drugs have become increasingly difficult for states to purchase due to stopped production and manufacturers’ refusal to sell to states for the purpose of execution. States have used new drugs or turned to compounding pharmacies in order to carry out executions.

Through 2009, most executions were carried out using the same formula approved in *Baze*. After that time, difficulties accessing drugs led some states to start using new drugs and combinations of substances. For example, Nebraska created a new formula using the opioid fentanyl and became the first state, in August 2018, to use it in an execution. Fentanyl has become notorious for its lethality, driving up overdose deaths in the opioid epidemic. Other new substances used have included cisatracurium besylate, diazepam, etomidate, fentanyl citrate, hydromorphone, midazolam, pentobarbital and potassium acetate.³

States have also brought back or introduced new methods of execution. In 2015, Oklahoma became the first state to legalize executions by nitrogen hypoxia (asphyxiation). By law, if nitrogen hypoxia and traditional lethal drugs are unavailable, officials may turn to electrocution or the firing squad, which lawmakers legalized as alternative back-ups methods. Mississippi enacted a substantially similar law in 2017, as did Alabama in 2018, though lawmakers there elected to let offenders choose nitrogen hypoxia over lethal injection even when the latter is available.

In total, 16 states have a secondary method of execution authorized by statute. Laws in Alabama, Arkansas, Mississippi, New Hampshire, Oklahoma, South Carolina, Tennessee, Utah and Wyoming provide a secondary option if lethal injection is found to be unconstitutional and/or unavailable. Arizona,⁴ Kentucky, Tennessee and Utah all have a choice of secondary methods for offenders who were sentenced before the introduction of lethal injection. And Alabama, California,⁵ Florida, Missouri, South Carolina, Virginia and Washington have other methods available if the offender requests an alternative. Secondary methods of execution include electrocution, lethal gas, hanging, nitrogen hypoxia and firing squad.

Secondary Methods of Execution

States with statutory secondary methods of execution that can be used by election or out of necessity due to unconstitutionality of lethal injection.

State	Statute	Secondary methods
Alabama	§15-18-82.1	Electrocution Nitrogen Hypoxia
Arizona	§13-757	Lethal Gas
Arkansas	§5-4-617	Electrocution
California	Penal Code §3604	Lethal Gas
Florida	§922.105	Electrocution
Kentucky	§431.220	Electrocution
Missouri	§546.720	Lethal Gas
Mississippi	§99-19-51	Nitrogen Hypoxia Electrocution Firing Squad
New Hampshire	§630:5	Hanging
Oklahoma	Title 22 §1014	Nitrogen Hypoxia Electrocution Firing Squad
South Carolina	§24-3-530	Electrocution
Tennessee	§40-23-114	Electrocution
Utah	§77-18-5.5	Firing Squad
Virginia	§53.1-234	Electrocution
Washington	§10.95.180	Hanging
Wyoming	§7-13-904	Lethal Gas

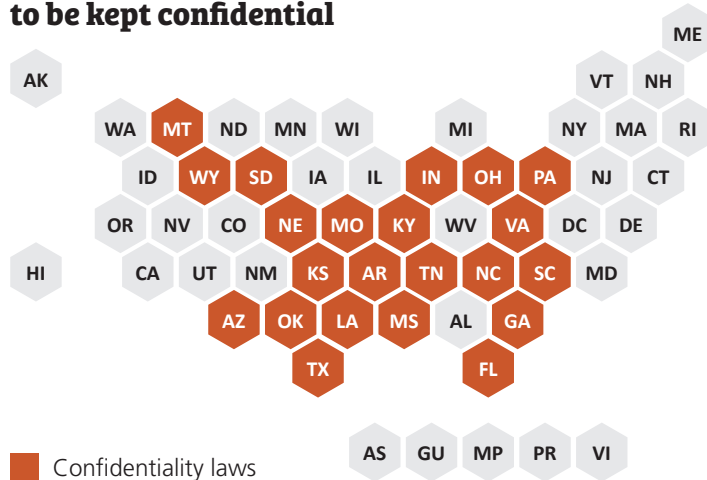
Source: NCSL, 2019

Confidentiality Laws

In addition to adopting secondary methods of execution, states have also tried to get executions back on track by enacting and expanding confidentiality laws. These efforts aim to keep various aspects of executions, including sources of drugs and identities of participants, a secret.

Historically, states have relied on general exceptions to public information laws to keep certain information about executions confidential, and statutes shielding the identity of executioners have been on the books for years. However, increasing difficulty in sourcing execution drugs has led states to enact or expand confidentiality laws specific to capital punishment. Twenty-two states have passed confidentiality laws specific to capital punishment. The majority of laws enacted in the last decade aimed to expand the information that is kept secret, mainly the source of execution drugs.

Require certain aspects of execution to be kept confidential



Source: NCSL, 2019

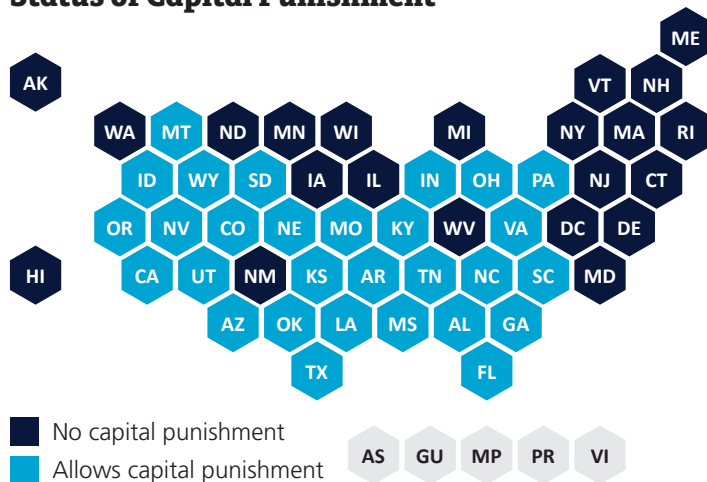
Many of these more specific laws have been heavily litigated in recent years. Notably, litigation of these laws extends beyond appeals filed by condemned inmates arguing against cruel and unusual punishment on Eighth Amendment and 14th Amendment grounds. Members of the press and civil rights groups have filed cases to gain access to information through freedom of information laws.⁶ Plaintiffs have also argued cases using the First Amendment. So far litigation hasn't been overwhelmingly successful, and the U.S. Supreme Court has declined to review the cases that have reached it.⁷

Abolition

Of the 37 states that reenacted capital sentencing schemes following the 1976 U.S. Supreme Court cases⁸ ending the national de facto moratorium,⁹ six states subsequently repealed their laws. New Jersey was the first in 2007, followed by New Mexico in 2009, Illinois in 2011, Connecticut in 2012, Maryland in 2013 and New Hampshire in 2019. Additionally, state court actions without subsequent legislative changes have essentially ended the practice. This is the case currently in Delaware, Massachusetts, New York, Rhode Island and Washington.

Voters have also had a direct impact on the status of capital punishment in the states. Ballot questions have reinstated capital punishment following legislative repeal and state court action in a couple of states. For example, the Nebraska Legislature abolished capital punish-

Status of Capital Punishment



Source: NCSL, 2019

ment in 2015 and a statewide vote the following year reinstated the law. In Oregon, voters have repealed capital punishment twice, once in 1914 and again in 1964. Voters have also restored capital punishment twice, once in 1920 and again in 1978. The law adopted in 1978 was later found to be unconstitutional by the Oregon Supreme Court in 1981. Once again, voters brought back the practice in 1984, changing the law to address the constitutional issues raised by the court.¹⁰

Like Oregon, the states that have elected to retain capital punishment have had to change their laws over time to comply with litigation outcomes and address logistical issues like limited access to execution drugs.

States have used moratoriums on executions to provide time to evaluate and modify laws and execution procedures. Moratoriums can be for short periods of time or they can be put in place indefinitely. For example, Oklahoma used a brief moratorium starting in late 2015, to allow time for a grand jury¹¹ to investigate problems with recent executions, including departures from execution protocols.¹² Other states have applied longer moratoriums. Illinois had one in place for more than a decade prior to the repeal of capital punishment.¹³ Currently, California, Colorado, Oregon, Pennsylvania and Washington all have indefinite moratoriums in place.

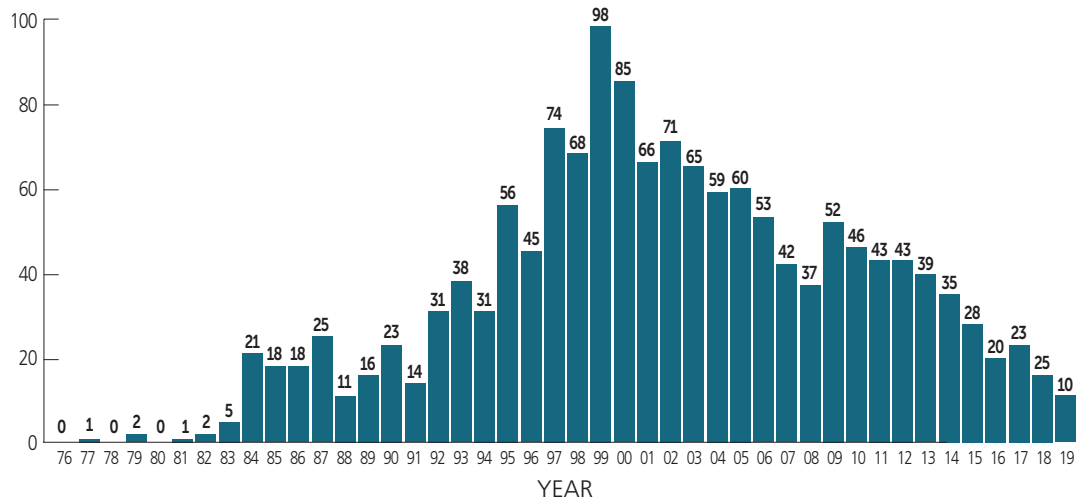
Capital Punishment by the Numbers

Executions and Admissions

New death sentences and executions remain at near-historic lows. Nationwide, 25 executions were carried out in 2018, compared with a modern high of 98 in 1999.¹⁴ Additionally, there were only 42 new death sentences nationally in 2018, with a previous high of 315 in 1996.¹⁵

Thirty-six states have carried out executions since 1976, but just over half of those states held fewer than 15 executions in that time. Nationally, only 2% of counties in the U.S. are responsible for the majority of cases leading to execution since 1976.¹⁶ At year-end 2016, California, Florida and Texas were responsible for nearly half of all inmates under a death sentence nationally.

Executions Over Time



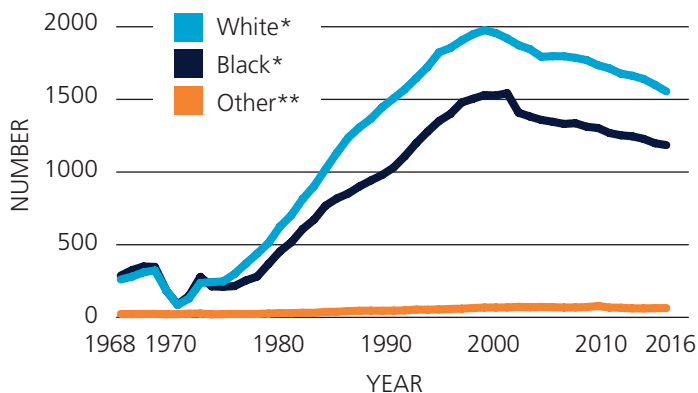
Source: Death Penalty Information Center, August 2019

Race and Gender

At year-end 2016, 98% of all prisoners under sentence of death were male, 55% were white and 42% were black.¹⁷ Since 1976, only 16 women have been executed.¹⁸

Inmates Under Sentence of Death by Race

1968-2016



*Includes people of Hispanic/Latino origin

**Includes American Indian and Alaskan Natives, Asians, Native Hawaiians and other Pacific Islanders and people of Hispanic/Latino origin for whom no other race was identified.

Source: Bureau of Justice Statistics, 2016

Methods of Execution

The majority of executions in the U.S. have been carried out by lethal injection. Since 1976, 1,323 executions have been by lethal injection, 160 were by electrocution, 11 by gas chamber, three by hanging and three by firing squad.¹⁹ Nitrogen hypoxia has not yet been tested in any execution.

Executions by Method Since 1976

Method	Number
Lethal injection	1323
Electrocution	160
Gas chamber	11
Hanging	3
Firing squad	3
Total	1,500

Source: Death Penalty Information Center, 2019

Cost

The cost of capital punishment has played a significant role in states that have abolished or reformed their capital punishment laws. Several states have attempted to study the cost of capital punishment cases versus cases where the death penalty is not pursued.

Cost of Capital Punishment

Data to compile a full picture of the cost of capital punishment is often incomplete or not available. Comparing costs across states is essentially impossible because of the limited data and wide variances in statutory framework and cost allocation. Below are some highlighted cost statistics from select states that have studied the issue.

These numbers are provided for informational purposes only and methodology and additional context for these numbers can be found in the full reports. Reports referenced below that made recommendations in addition to presenting information, came to varying conclusions, including that capital punishment laws and practices should be modified, repealed or maintained, and some reports analyzed all three possibilities.

Full text of the reports highlighted below and additional state reports can be accessed on NCSL's webpage.

■ Arizona Attorney General's Capital Case Commission (2001)

- Estimated cost for a capital case: \$163,897.26.
- Estimated cost for a capital case resulting in life sentences: \$118,165 (1990-1993) to \$128,454.35 (1998-1999).
- Noncapital cases resulting in life sentences: \$70,231.34.
- Cost of incarceration from indictment to sentencing: \$27,097.07 for capital inmates and \$16,909.05 for noncapital inmates.

■ California Commission on the Fair Administration of Justice (2008)

- Estimated cost of trial, appeal, habeas procedures and confinement costs for capital cases:
 - o \$137.7 million – estimated annual cost of the system in 2008.
 - o \$11.5 million – estimated annual cost for adopting life without parole in lieu of capital punishment.
 - o \$232.7 million – estimated annual cost after adopting commission recommendations to the existing system.
 - o \$130 million – estimated annual cost after legislation to significantly narrow eligible cases by limiting special circumstances.

■ Indiana General Assembly, Legislative Services Agency (2015)

- The average cost of a death penalty case that goes to a jury trial is \$789,581 with the state being responsible for \$420,234 and the county of jurisdiction being responsible for \$369,347.
- The average cost of a death penalty case that resulted in a guilty plea was still more than two times more expensive than a life without parole case at an average cost of \$433,702.
- The average cost of a life without parole case that goes to a jury trial is \$185,422 with the state being responsible for \$151,890 and the county of jurisdiction being responsible for \$33,532.

■ Idaho Legislature, Office of Performance Evaluations (2014)

- In 2011 the Idaho Department of Corrections spent nearly \$170,000 to remodel and update facilities to prepare for the state's first execution in 17 years.
- Additional costs associated with the 2011 execution totaled \$53,212.

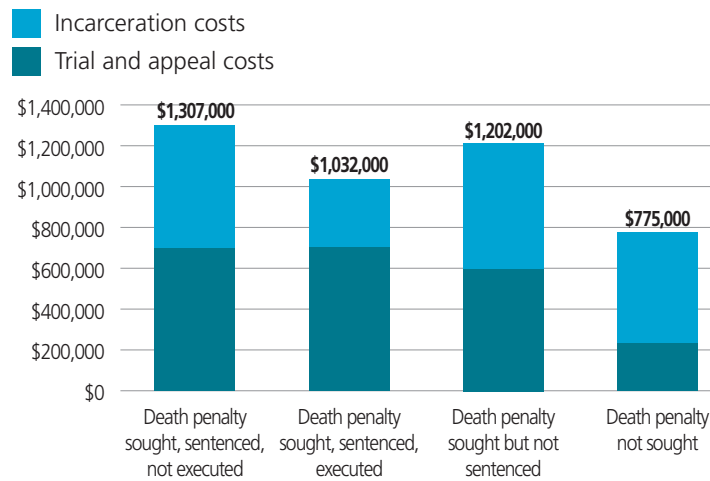
■ Kansas Judicial Council Death Penalty Advisory Committee (2014)

- Cost of confinement on death row: \$49,380.
- Cost of confinement for general population: \$24,690.
- \$395,762 – average cost of defense for death penalty trial and appeal.
- \$98,963 – average cost of defense for non-death case trial and appeal.

■ **Nevada Legislative Auditor, Performance Audit (2014)**

- Capital punishment cases from arrest through the end of incarceration cost about \$532,000 more than murder cases.

Cost Differential of the Death Penalty



Source: Nevada Legislative Auditor, 2014

■ **New Hampshire Commission to Study the Death Penalty (2010)**

- Only two capital cases had been litigated in the preceding 50 years at the time of the study, so costs estimates were specific to those cases.
- For the sole case that resulted in a sentence of death:
 - o The attorney general spent an estimated \$1,729,161 on investigation and prosecution.
 - o The public defender spent an estimated \$1,137,000 through the end of 2009 and anticipated an additional \$826,054 would be necessary for defense costs in 2010 and 2011.
 - o The Judicial Council spent an estimated \$348,036 on expert witnesses, investigative services and forensic work.

■ **New Jersey Death Penalty Study Commission Report (2007)**

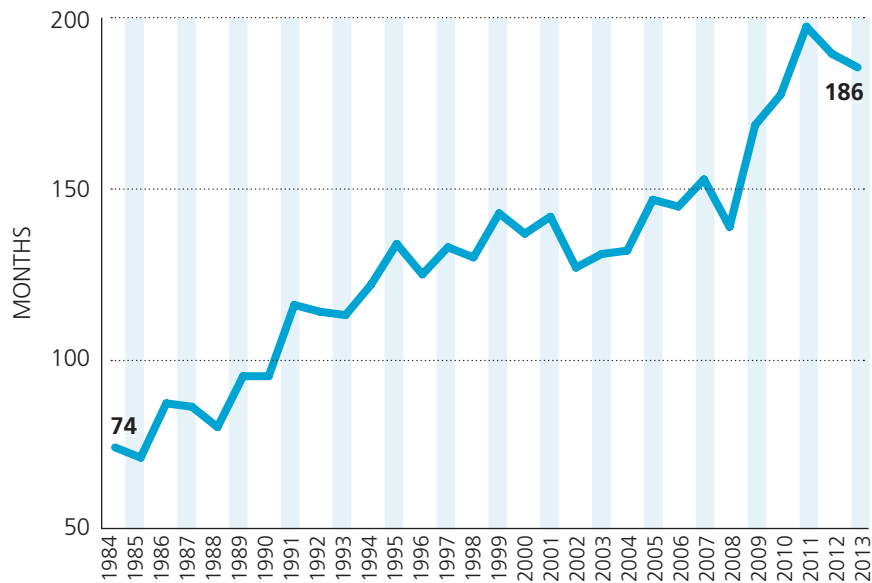
- The commission made findings that the costs of capital punishment exceed those associated with life in prison without parole, but also found that it was not possible to measure costs with any degree of precision. However, the Office of the Public Defender estimated that elimination of capital punishment would result in savings of \$1.46 million per year and the Department of Corrections estimated that elimination of capital punishment would save \$974,430 to \$1,299,240 per inmate over each inmate’s lifetime.

■ **Tennessee Comptroller of the Treasury Office of Research (2004)**

- Capital trials cost more than life without the possibility of parole trials by an estimated \$15,297.
- Execution of an inmate saves approximately \$773,736 in future incarceration costs of an inmate when compared to an inmate sentenced to life without parole.
- Extra security, medical supplies, medical personnel and lethal injection chemicals cost \$11,688 for the state’s most recent execution at the time of the report.

Average Time Between Sentencing and Execution

1984-2013



Source: Bureau of Justice Statistics, 2013

Length of Stay

Nationally, 15.5 years was the average length of time between sentencing and execution in 2013, the most recent year data is available.²⁰ Additionally, execution isn't the only way off of death row. In 2016, a total of 90 individuals were removed from under a sentence of death across the nation. Of those, 20 were executed, 19 died of natural causes, and 51 were removed because an appeals court overturned the conviction, death sentence or capital statute.²¹

Notes

1. National Conference of State Legislatures (NCSL), *States and Capital Punishment* (Denver, Colo.: NCSL, June 12, 2019), <http://www.ncsl.org/research/civil-and-criminal-justice/death-penalty.aspx>.
2. See *Hall v. Florida*, 572 U.S. 701 (2014); *Moore v. Texas*, 137 S.Ct. 1039 (2017); and *Moore v. Texas*, 139 S.Ct. 666 (2019).
3. Robin Konrad, *Behind the Curtain: Secrecy and the Death Penalty in the United States* (Washington, D.C.: Death Penalty Information Center, Nov. 20, 2018), <https://files.deathpenaltyinfo.org/documents/pdf/SecrecyReport-2-f1560295685.pdf>.
4. See case law in each state to determine the constitutionality of secondary methods. For example, see *La Grand v. Stewart*, 173 F.3d 1144 (1999).
5. *Ibid.*
6. Reporters Committee for Freedom of the Press (RCFP), “Lethal Secrecy” (Washington, D.C.: RCFP, n.d.), <https://www.rcfp.org/journals/news-media-and-law-spring-2014/lethal-secrecy/>.
7. For example, see *Abdur’rahman v. Parker*, 139 S.Ct. 1533 (2019).
8. Referred to collectively as the July 2 cases by some. See—James S. Liebman, “Slow Dancing with Death: The Supreme Court and Capital Punishment, 1963-2006,” *Columbia Law Review* 107, no. 1 (2007), https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1119&context=faculty_scholarship.
9. *Furman v. Georgia*, 408 U.S. 238 (1972).
10. Oregon Department of Corrections (ODOC), “Oregon Death Penalty” webpage, <https://www.oregon.gov/doc/about/Pages/oregon-death-penalty.aspx>.
11. Fifteenth Multicounty Grand Jury of Oklahoma, *Interim Report No. 14: Findings of the Fifteenth Multicounty Grand Jury as to the Use and Attempted Use of Potassium Acetate by the Oklahoma Department of Corrections in the Execution of Inmate Charles Frederick Warner and the Scheduled Execution of Inmate Richard Glossip* (Oklahoma City, Okla.: District Court of Oklahoma County, May 19, 2016), <https://files.deathpenaltyinfo.org/legacy/files/pdf/MCGJ-Interim-Report-5-19-16.pdf>.
12. Oklahoma Death Penalty Review Commission (DPRC), *The Report of the Oklahoma Death Penalty Review Commission* (Oklahoma City, Okla.: DPRC, March 2017), <https://www.courthousenews.com/wp-content/uploads/2017/04/OklaDeathPenalty.pdf>.
13. NPR, “Illinois Abolishes the Death Penalty,” March 9, 2011, <https://www.npr.org/2011/03/09/134394946/illinois-abolishes-death-penalty>.
14. Tracy L. Snell, “Prisoners Executed under Civil Authority in the United States, by Year, Region, and Jurisdiction, 1977-2016” (Washington, D.C.: Bureau of Justice Statistics, April 30, 2018), <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=2079>; see also —The Marshall Project, “The Next to Die: Watching Death Row” website, <https://www.themarshallproject.org/next-to-die>.
15. Elizabeth Davis and Tracy L. Snell, “Capital Punishment, 2016,” *Statistical Brief* (Bureau of Justice Statistics NCJ 251430) (April 2018), <https://www.bjs.gov/content/pub/pdf/cp16sb.pdf>; see also Death Penalty Information Center (DPIC), “Death Sentences in the United States since 1977” webpage, <https://deathpenaltyinfo.org/facts-and-research/sentencing-data/death-sentences-in-the-united-states-from-1977-by-state-and-by-year>.
16. Richard C. Dieter, “The 2% Death Penalty: How a Minority of Counties Produce Most Death Cases at Enormous Costs to All” (Washington, D.C.: Death Penalty Information Center, October 2013), <https://deathpenaltyinfo.org/facts-and-research/dpic-reports/in-depth/the-2-death-penalty-how-a-minority-of-counties-produce-most-death-cases-at-enormous-costs-to-all>.
17. Davis, “Capital Punishment, 2016.”
18. Death Penalty Information Center (DPIC), “Facts About the Death Penalty” (Washington, D.C.: DPIC, updated May 31, 2019), <https://files.deathpenaltyinfo.org/legacy/documents/FactSheet.pdf>.
19. *Ibid.*
20. Tracy L. Snell, “Capital Punishment, 2013 – Statistical Tables” (Washington, D.C.: Bureau of Justice Statistics, Dec. 19, 2014), <https://www.bjs.gov/content/pub/pdf/cp13st.pdf>.
21. Davis, “Capital Punishment, 2016.”

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