







*B. Race*

Another reason for the declining public support is the concern over the continued racial disparities in the administration of the death penalty. Racism in the implementation of the death penalty is not a relic of the past.<sup>22</sup> African-Americans continue to be sentenced to death and executed disproportionately. African-Americans constitute roughly 13 percent of the U.S. population,<sup>23</sup> yet they account for about 42 percent of the death row population<sup>24</sup> and approximately 35 percent of all executions in the U.S. since 1976.<sup>25</sup> Also troubling is the fact that the vast majority of those who have been executed killed white victims,<sup>26</sup> despite the fact that approximately 44 percent of murder victims in the United States are African-American.<sup>27</sup> Since 1976, 76 percent of those who have been executed killed White victims.<sup>28</sup>



could constitute a future danger to society even if he is incarcerated for the remainder of his life.<sup>42</sup>

<sup>43</sup> This expert told the jury

over represented in the Criminal Ju <sup>44</sup> The same statement was included in his report, which was submitted to the jury.<sup>45</sup> After the jury sentenced Buck to death, he has continuously raised the fact that the jury was told that he would be more dangerous in the future because of he was African American on appeal, including three trips to the U.S. Court of Appeals for the Fifth Circuit, but all of his appeals have been denied.<sup>46</sup>

A major reason why the problem of racial disparities in capital sentencing persists is because those who decide whether the defendant lives or dies are typically overwhelmingly white:

[T]he criminal justice system is the part of American society that has been least affected by the Civil Rights Movement. Many courthouses throughout the country look about the same today as they did in the 1940s and 1950s. The judges are white, the prosecutors are white, and the court-appointed lawyers are white. Even in communities with fairly substantial African American populations, all of the jurors at a trial may be white.<sup>47</sup>

According to a recent study, 95 percent of elected state and local

2017] *WHY THE DEATH PENALTY IS SLOWLY DYING* 259

they were opposed to the death penalty while only 39 percent were in favor.<sup>50</sup>  
As a result, a jury composed of African Americans is significantly less likely





2017]      *WHY THE DEATH PENALTY IS SLOWLY DYING*      261



2017]

the ground that police officers had obtained evidence by violating his constitutional rights.<sup>98</sup> trial occurred in 1992 and took 14 years to move through the California appellate process.<sup>99</sup> As this article goes to print, Boyer still has not been executed and given the small number of executions that have occurred in California,<sup>100</sup> he is not likely to be.

death row in the United States<sup>101</sup> but rarely carries out executions.<sup>102</sup> The California Commission on the Fair Administration of Justice has labeled the<sup>103</sup> The Commission noted that death row inmates are more likely to have their sentences overturned or die from natural causes than they are to be executed.<sup>104</sup> California is not an aberration. Nationwide, it takes an average of approximately 18 years to carry out a death sentence.<sup>105</sup> These delays have left both proponents and opponents frustrated with the system and has undoubtedly contributed to the loss of public confidence and support for the death penalty both in California and nationwide.

#### F. *Life Without Parole (LWOP)*

In the past, jurors often voted for death in order to ensure that dangerous defendants remained in jail and were never released on parole.<sup>106</sup> Now that most states provide jurors with the option of sentencing the defendant to life without parole, jurors are more confident that the defendant will not be released and as a result, they are meting out fewer death sentences and the public seems to agree with those decisions. In a recent poll, 52 percent of the public preferred life without parole whereas 42 percent preferred the death penalty.<sup>107</sup> Even among those who support the death penalty, 29 percent preferred life without parole. The public is increasingly less willing to accept

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98. *Id.*

99. *Id.*

100. *Number of Executions by State and Region since 1976*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976> (last visited Jan. 21, 2017)

101. *Id.*

102. *Id.*

103. *See Boyer v. Davis*, 136 S. Ct. 1446 (2016) (Breyer, J., dissenting).

104. *Id.*

105. *Glossip v. Gross*, 135 S. Ct. 2726, 2764 (2015).

106. *See Amanda Dowlen, An Analysis of Texas Capital Sentencing Procedure: Is Texas Denying Its Capital Defendants Due Process By Keeping Judges Uninformed of Parole Eligibility?*, 29 TEX. TECH. L. REV. 1111, 1134-38 (1998).

107. Damla Ergun, *New Low in Preference for the Death Penalty*, ABC NEWS (June 5, 2014), <http://abcnews.go.com/blogs/politics/2014/06/new-low-in-preference-for-the-death-penalty>.



*A. Reform*

There have been numerous proposals have been made by academics,<sup>115</sup> state commissions<sup>116</sup> and others to address many of the issues that have troubled the public about the system. In order to minimize the risk of an innocent person being executed, a number of reforms have been enacted and proposed. For instance, several proposals have been made to minimize the possibility of a misidentification.<sup>117</sup> One such proposal is that lineups be administered by officers who are not involved in the investigation and who are not familiar with the suspect in order to ensure that they do not send signals, deliberate or unconscious, to the witness as to whom the suspect might be.<sup>118</sup> To address the problem of suggestive lineups, some have proposed that individuals in a lineup be presented

individuals in the lineup and choose the individual who most resembles the suspect.<sup>119</sup> Witnesses often believe that the suspect is part of the lineup and therefore feel pressure to pick someone in the lineup as the perpetrator.<sup>120</sup> Some have proposed informing witnesses that the suspect may not be in the lineup to reduce this pressure.<sup>121</sup>

Another cause of wrongful convictions is misconduct by prosecutors and police. In *Brady v. Maryland*,<sup>122</sup> the Supreme Court held that prosecutors were constitutionally required to disclose exculpatory evidence to the defense but they often fail to fulfill this duty. According to federal appeals court *Brady* violations abroad in the

<sup>123</sup> Furthermore, police sometimes extract false confessions from suspects. To deal with the problem of prosecutorial misconduct, Judge Kozinski believes that open file discovery should be required.<sup>124</sup> Thus, if open file discovery is required, prosecutors would be required to disclose any evidence bearing on the crime with which a defendant is being charged, not

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115. See, e.g., Kenneth Williams,



of the Act.<sup>138</sup> However, after a state judge sentenced a defendant to death based on the Racial Justice Act, the North Carolina legislature repealed its Racial Justice Act.<sup>139</sup>

After reinstating the death penalty in 1976,<sup>140</sup> the Court has regulated it in an attempt to minimize arbitrariness and l





in the few cases in which the death penalty is imposed, it is usually not the egregiousness of the crime that is the determining factor but rather that there are other factors which cause defendants to be sentenced to death.<sup>159</sup> These factors that Justice Breyer identified include the race of both the defendant and the victim,<sup>160</sup> the gender of the defendant,<sup>161</sup> the place where the crime was committed,<sup>162</sup> the lack of resources available to defense counsel,<sup>163</sup> the

2017] *WHY THE DEATH PENALTY IS SLOWLY DYING* 271

which the Constitution explicitly<sup>172</sup> In support of his position, Justice Scalia specifically refers to the Fifth Amendment which . . . crime,

ed of life . . . without due process of<sup>173</sup> These two provisions in the Constitution, it will be argued, make it clear that the framers did not intend to prohibit capital punishment when they enacted the Eighth Amendment.<sup>174</sup> th Amendment, it was enacted only to prohibit those punishments that added<sup>175</sup>

There are a couple of major flaws in the argument that the death penalty is constitutional because of the Fifth Amendment. First, the Fifth Amendment does not confer power onto the state.<sup>176</sup> Rather it limits the power of the state by requiring certain procedural safeguards.<sup>177</sup> As Justice f the Congress to punish capitally shall be inviolable; it merely requires that f

not proper part of the business of this Court, or of its Justices, to second guess that judgment, much less to impugn it before the world, and less still

political force for the first time.<sup>188</sup> Within a few months of the decision, pro-death penalty activists campaigned in every state for reinstatement of the death penalty and they were joined by police chiefs, state attorney generals, local district attorneys, and assorted politicians.<sup>189</sup> Within two years of the decision, thirty-five states had enacted new capital statutes<sup>190</sup> and the Supreme Court responded to the backlash by reinstating the death penalty four years later.<sup>191</sup>

Several factors suggest that the current Court would not face a similar backlash should it find the death penalty unconstitutional. First, prior to *Furman*, the Court had not issued any decisions regulating the death penalty.<sup>192</sup> States had almost unfettered latitude in carrying out the death penalty.<sup>193</sup> Since 1976, the Court has placed important limitations on capital punishment.<sup>194</sup> Therefore, the doctrinal framework is in place for the Court to strike down the death penalty. Furthermore, several members of the Court, both past and present, have been critical of the death penalty.<sup>195</sup> Because of their criticisms, the public has been alerted to the fact that there are problems in the administration of the death penalty. Thus, a decision invalidating capital punishment would not be totally unexpected as it had been when the Court issued its holding in *Furman*. Second, the politics of the death penalty has substantially changed.<sup>196</sup> Candidates no longer need to run for office making their support for the death penalty a major campaign issue.<sup>197</sup> Third,

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188. *Id.* at 232-33.

189. *Id.* at 232.

190. *Id.* at 233.

191. *See* *Gregg v. Georgia*, 428 U.S. 153, 179 (1976).

192. *See* Arthur J. Goldberg & Alan M. Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1798.

193. *See id.* at 1774-76.

194. Juveniles and the mental retarded cannot be executed. *See* *Roper v. Simmons*, 543 U.S. 551, 578-579 (2005); *see also*

a decision striking down the death penalty is likely to be well received in the international community given the international movement against capital punishment.<sup>198</sup>

#### IV. CONCLUSION

As this paper has demonstrated, the death penalty has too many problems that simply cannot be fixed. Several states have realized this and have decided to abolish the death penalty.<sup>199</sup> Even in the states that retain the death penalty, it is becoming increasingly marginalized.<sup>200</sup> It is only a matter of time before the U.S. Supreme Court comes to the same realization and imposes the final death sentence on the death penalty itself!

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198. *The World Moves Towards Abolition*, AMNESTY INT'L USA, <http://www.amnestyusa.org/our-work/issues/death-penalty/international-death-penalty> (last visited Sept. 12, 2016), (International death penalty trends are unmistakably towards abolition. ).

199. See Lyn Suzanne Entzeroth, *The End of the Beginning: The Politics of Death and the*